SHDKT PROCEEDINGS AND ORDERS DATE: [06/26/90]

CASE NBR: [89105934] CSH STATUS: [DECIDED]
SHORT TITLE: [Cartwright, William T.]
VERSUS [Oklahoma] DATE DOCKETED: [102789]
PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Sep 19 1989	G	Application (A89-224) to extend the time to file a petition for a writ of certiorari from September 29, 1989 to October 29, 1989, submitted to Justice White.
2	Sep 19 1989		Application (A89-224) granted by Justice White extending the time to file until October 27, 1989.
3	Oct 27 1989	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Nov 29 1989		Brief of respondent Oklahoma in opposition filed.
6	Dec 7 1989		DISTRIBUTED. January 5, 1990
7	Mar 6 1990	G	Application (A89-624) for a stay of enforcement of judgment pending disposition of petition for writ of certiorari, submitted to Justice White.
8	Mar 7 1990		Application (A89-624) granted by Justice White. Execution and enforcement of the judgment of the Court of Criminal Appeals of Oklahoma, case No. H-88-820,

*** Related Case - Use VIDE,LS with HF ***

Last page of docket
SHDKT PROCEEDINGS AND ORDERS DATE: [06/26/90]

CASE NBR: [89105934] CSH STATUS: [DECIDED]
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	DATE	NOTE	PROCEEDINGS & ORDERS
8	Mar 7 1990		Application (A89-624) granted by Justice White. Execution and enforcement of the judgment of the Court of Criminal Appeals of Oklahoma, case No. H-88-820, entered July 31, 1989 is stayed pending disposition of petition for writ of certiorari.
9	Jun 15 1990		REDISTRIBUTED. June 21, 1990
11	Jun 25 1990		Petition DENIED. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. (Detached opinion.)

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*** Related Case - Use VIDE,LS with HF ***

ORIGINAL

89-5934

No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WILLIAM THOMAS CARTWRIGHT

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

MANDY WELCH*
Deputy Appellate Public Defender

MARK BARRETT
Assistant Appellate Public Defender

1660 Cross Center Drive
Norman, Oklahoma 73019
(405) 325-3331

ATTORNEYS FOR PETITIONER

Counsel of Record*

27

October, 1989

QUESTIONS PRESENTED

1. Whether a retroactive application of a new resentencing statute violates the **ex post facto** clause when the new law changes the maximum punishment from life to death?

2. Whether a judicial change in the construction of capital resentencing laws can abolish an antecedent right to a life sentence without violating due process.

3. Whether due process and equal protection of the laws permit a court to retroactively apply an increase in possible punishment on resentencing from life to death in petitioner's case when it has not so applied the increase in other similarly situated cases.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

WILLIAM THOMAS CARTWRIGHT

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

The petitioner, William Thomas Cartwright, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Oklahoma Court of Criminal Appeals entered on July 31, 1989.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals retroactively applying an amendment to the capital sentencing statutes to petitioner's case and remanding the case to the District Court of Muskogee County, Oklahoma, for a resentencing hearing is reported at 778 P.2d 479 (Okla. Cr. 1989). A copy of the opinion is reproduced in the appendix at 1a.

JURISDICTIONAL STATEMENT

On July 31, 1989, the Court of Criminal Appeals entered judgment remanding petitioner's case to the trial court for a resentencing proceeding at which he can be resentenced to death based on a retroactive application of an amendment to Oklahoma's capital sentencing statutes. **Cartwright v. State**, 778 P.2d at 843. Appendix at 4a. On

September 19, 1989, Justice White extended the time for petitioning for a writ of certiorari to and including October 27, 1989.

The jurisdiction of this Court to review the judgment of the Oklahoma Court of Criminal Appeals is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, Section 10, of the United States Constitution provides:

> No state shall ... pass any ... ex post facto Law.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides:

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law ...

STATUTES INVOLVED

Section 701.13(E) of Title 21, Oklahoma Statutes (1981) provides in pertinent parts:

> E. [T]he court, with regard to review of death sentences, shall be authorized to:
>
> 1. Affirm the sentence of death; or
> 2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

Section 701.13(E) of Title 21, Oklahoma Statutes (as amended in 1985) provides in pertinent parts:

> E. [T]he court, with regard to review of death sentence, shall be authorized to:
>
> 1. Affirm the sentence of death; or
> 2. Set the sentence aside and remand the case for resentencing by the trial court.

STATEMENT OF THE CASE

A. Statement of Facts

Under the 1976 Oklahoma death penalty statutes, a person initially sentenced to death for first degree murder whose death sentence was determined to be invalid because of error in the sentencing proceeding was automatically entitled to be resentenced to life imprisonment and could not be resubjected to a possible death sentence. Okla. Stat. tit. 21 Sec. 701.13(E)(2) (West 1981) (when death sentence is invalid the court must "remand for modification to life imprisonment). See Appendix at 26a listing of cases in which death sentences were modified to life under the 1976 version of § 701.13(E)(2). This provision limiting resentencing to life imprisonment was applicable regardless of whether the death sentence was invalidated by a state or federal court. See **Chaney v. Brown**, 699 P.2d 159 (Okla. Cr. 1985).[1]

Mr. Cartwright was tried and convicted of murder in the first degree and sentenced in September, 1982. The offense for which he was convicted occurred in April, 1982. Judgment and sentence of death was entered on October 25, 1982.

On direct appeal to the Court of Criminal Appeals, petitioner challenged the constitutionality of his death sentence on the basis of a vague and overbroad construction and application of Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance. The Oklahoma Court of Criminal Appeals affirmed the conviction and sentence on January 7, 1985, rejecting Mr. Cartwright's constitutional challenge to the "especially heinous" aggravating circumstance. **Cartwright v. State**, 695 P.2d 549 (Okla. Cr. 1985). A petition for a writ of certiorari was denied on July 1, 1985. **Cartwright v. Oklahoma**, 473 U.S. 911 (1985) At all times from the time of the offense through trial and direct appeal, a defendant whose death sentence was invalid because of error during the sentencing proceeding was entitled to a life sentence. Under Oklahoma law as interpreted by Oklahoma Court of Criminal Appeals, if the Court of Criminal Appeals had invalidated Mr. Cartwright's death sentence on direct appeal, he **could not** have been subjected to another death sentence, and he **would** have received a life sentence. During

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[1] Judge Parks, specially concurring in **Chaney**, stated:

> I write separately only to emphasize that it is our State statute, not the United States or Oklahoma constitution, which prohibits resentencing of this appellant. As Judge Brett has explained in the course of his opinion, 21 O.S. 1981, § 701.13(E) allows this Court one remedy only if error has tainted the validity of the sentencing stage of trial, and that is to modify the sentence to life imprisonment.

699 P.2d at 162.

the same period of time, (1982-1985), the Oklahoma court modified eight death sentences to life imprisonment on the basis of the 1976 version of Section 701.13(E)(2).[2]

As of July 16, 1985, Section 701.13(E)(2) was amended to provide for reimposition of the death sentence. Okla. Stat. tit. 21, § 701.13(E)(2) (Supp. 1988). Shortly thereafter in **Green v. State**, 713 P.2d 1032, 1041 (Okla. Cr. 1985), **cert. denied**, 479 U.S. 871, 107 S.Ct. 241 (1985), the Oklahoma Court of Criminal Appeals held that retroactive application of the new resentencing provision would deprive the appellant of a substantial right to which he was entitled under the law applicable at the time of his offense -- the right to a life sentence -- and thus would violate the **ex post facto** clause of Article I, Section 10 of the United States Constitution. **See also Dutton v. Dixon**, 757 P.2d 376, 378 (Okla. Cr. 1988) (quoting **Green** at 1041 n. 4.)[3] Under **Green** and the court's later decision in **Dutton v. Dixon**, the statutory limitation on the punishment that could be imposed on resentencing remained in effect with respect to offenses occurring before July 16, 1985, until the Oklahoma court's decision in this case which is the subject of this petition for a writ of certiorari. Appendix at 1a.

In 1986, following state post-conviction proceedings, Mr. Cartwright filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Oklahoma. On appeal, the Tenth Circuit Court of Appeals affirmed his conviction, but on rehearing **en banc**, it invalidated his death sentence. **Cartwright v. Maynard**, 822 F.2d 1477 (10th Cir. 1988) affirmed **Maynard v. Cartwright**, 486 S.Ct. 356 (1988). The court's decision that Mr. Cartwright's death sentence was "invalid under the Eighth and Fourteenth Amendments of the United States Constitution" was based on its determination

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[2] **See Johnson v. State**, 665 P.2d 815 (Okla. Cr. 1982) (on rehearing); **Barnes v. State**, 640 P.2d 533 (Okla. Cr. 1982); **Boutwell v. State**, 659 P.2d 322 (Okla. Cr. 1983); **Glidwell v. State**, 663 P.2d 738 (Okla. Cr. 1983); **Driskell v. State**, 659 P.2d 343 (Okla. Cr. 1983); **Jones v. State**, 660 P.2d 634 (Okla. Cr. 1983); **Munn v. State**, 658 P.2d 482 (Okla. Cr. 1983); **Eddings v. State**, 688 P.2d 342 (Okla. Cr. 1983) (on rehearing); and **Chaney v. Brown**, 699 P.2d 159 (Okla. Cr. 1985).

[3] In **Green**, the death sentence of a co-defendant (Parker) was modified to life because one of the aggravating circumstances relied on by the jury was not supported by the evidence. 713 P.2d at 1043.

that Oklahoma's "especially heinous" circumstance as applied in his case was unconstitutionally vague. 822 F.2d at 1492. In the State's brief on rehearing, respondent specifically acknowledged that, under Oklahoma law, if the "especially heinous" circumstance was determined to be constitutionally invalid, Mr. Cartwright could be resentenced only to life imprisonment.[4]

While Mr. Cartwright's case was pending in this Court on a writ of certiorari to the Tenth Circuit, **Maynard v. Cartwright**, 486 U.S. 356 (1988) (affirming 10th Circuit decision), the Oklahoma Court of Criminal Appeals again considered the retroactivity of the 1985 resentencing statute. **Dutton v. Dixon**, 757 P.2d 376 (Okla. Cr. 1988). In **Dutton**, the petitioner's death sentence had been invalidated by the Tenth Circuit, and the state was attempting to initiate resentencing proceedings. The issue before the Oklahoma Court was whether Dutton could be resentenced to death under the 1985 resentencing provision or was entitled to a life sentence under the pre-1985 resentencing statute. The Oklahoma court held that the 1985 resentencing provision was not retroactive as a matter of **Oklahoma law** and thus could not be applied to offenses which were committed prior to its adoption. **Id.** at 381. In so holding, the court expressly relied on Section 3 of Title 22 which provides: "[n]o part of this code is retroactive unless expressly so declared."[5] 757 P.2d at 381. **Dutton** also specifically reaffirmed the Oklahoma Court's previous holding in

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[4] In its brief on rehearing the state advised the court:

> Under Oklahoma law, if one or more aggravating circumstances is found to be invalid by the Court of Criminal Appeals, the sentence is to be modified to life. **Johnson (Kenneth Ray) v. State**, 665 P.2d 815, 826 (Okla. Crim. App. 1983); **Boutwell v. State**, 659 P.2d 322, 329 (Okla. Crim. App. 1983). While the legislature amended the law in 1985 to allow resentencing in such a case, **see** Okla. Stat. Ann. tit. 21 § 701.13 (West Supp. 1987), the Court of Criminal Appeals has held that this statute is not to be applied retroactively, and therefore, it would not apply to the present case. **Green v. State**, 713 P.2d 1032, 1041, n.4 (Okla. Crim. App. 1985).

Supplemental Brief of Appellees-Respondents at 12, **Cartwright v. Maynard**, (on rehearing **en banc**). When the Tenth Circuit vacated Mr. Cartwright's death sentence, it expresly declined to address the constitutionality of a retroactive application of the 1985 resentencing statute. 822 F.2d at 1492 n.8.

[5] **Dutton** held that "this code" as used in Section 3 of Title 22 applies to Title 21 (penal code) and Title 22 (code of criminal procedure) and thus applies to the 1985 resentencing statute.

Green that the pre-1985 statute bestowed "a substantial right" upon capital defendants whose initial death sentences were invalid. It held that retroactive application of a legislative enactment abolishing that right violated **ex post facto** prohibitions of the United States and Oklahoma Constitutions.[6] Thus, under **Dutton** and all preceding decisions of the Oklahoma Court of Criminal Appeals, when a conviction for a capital murder committed prior to July 16, 1985, was affirmed and the death sentence invalidated, that defendant had a right to a life sentence and **could not** be resentenced to death. **See Dutton**, and **Green**. **Bromley v. State**, 757 P.2d 382 (Okla. Cr. 1988); **Wilson v. State**, 756 P.2d 1240 (Okla. Cr. 1988); and **Brennan v. State**, 766 P.2d 1385 (Okla. Cr. 1988).

After the entry of a final judgment of the United States District Court of the Eastern District of Oklahoma invalidating his death sentence, (Appendix at 24a), Mr. Cartwright petitioned the Court of Criminal Appeals for an order requiring that his invalid death sentence be modified to life imprisonment. Mr. Cartwright relied on Oklahoma law as it existed at that time. Instead of ordering modification, the Court of Criminal Appeals created an exception to the previously articulated principle of nonretroactivity, applied that exception to the 1985 resentencing statute, reversed the **ex post facto** ruling in **Dutton**, and held that Mr. Cartwright could be resentenced under the 1985 resentencing statute. The Oklahoma Court thereby abolished Mr. Cartwright's right to a life sentence that existed under the law in effect both at the time his crime was committed and when his death sentence was later invalidated. **Cartwright v. State**, 778 P.2d 479 (Okl. Cr. 1989); Appendix 1-4a. With respect to the **ex post facto** holding in **Dutton**, the Oklahoma court declared that the resentencing statute was "procedural", **Dutton** and prior decisions to the contrary notwithstanding. 778 P.2d at 482.

Challenging the court's decision as a denial of due process and equal protection of the laws, and a violation of **ex post facto** prohibitions, Mr. Cartwright petitioned the court

[6] The court characterized the 1985 resentencing provision as "a law which 'inflicts a greater punishment than the law annexed to the crime at [the] time it was committed or alters [the] situation of [an] accused to his disadvantage.'... While the 1985 resentencing amendment may appear to take 'a seemingly procedural form' **Weaver v. Graham** ... in its practical operation it deprives the petitioner of a substantial right and, under **Miller** ... it is therefore **ex post facto**". **Dutton**, 757 P.2d at 381.

to reconsider its decision and to limit his resentencing to life imprisonment under the pre-1985 resentencing statute. Appendix at 5a. On September 5, 1989, the court denied the petition. Appendix at 23a.

REASONS FOR GRANTING CERTIORARI

A. This case raises important and unsettled constitutional questions about retroactive application of onerous changes in punishment standards.

This case raises important constitutional questions about a retroactive application of a substantial and detrimental change in the standard of punishment that can be imposed on a particular category of defendants. It raises a straight forward **ex post facto** question regarding a retroactive application of an increase in the maximum sentence available for a specific class of persons convicted of first degree murder.[7] The case presents due process questions about the potential for arbitrary and vindictive actions if a court is permitted to retroactively apply a change in its construction of state law and deprive an individual of an existing right to an automatic life sentence and expose him to a death sentence. It raises due process questions about the application of a standard of punishment in petitioner's case that is substantially more onerous than the standard of punishment permitted under the law in effect when the state court erroneously affirmed his death sentence on direct appeal and when the federal court later invalidated his death sentence. Petitioner's case is the first and only case in which the Oklahoma court has held that a 1985 resentencing statute can be applied to a case in which the offense occurred prior to July 16, 1985 (the effective date of the act). Under the holding in this case, all defendants whose death sentences are invalidated in the future by a state or federal court, regardless of date of the offense or the stage of the proceeding (direct appeal, state post-conviction, or federal habeas), and all defendants whose death sentences have been invalidated but who have not yet been resentenced will be subjected to a new

[7] Persons whose original death sentence was invalidated because of error during the sentencing proceeding and whose offenses occurred before July 16, 1989, are no long entitled to the benefit of the law in effect at the time of their offense which provided for an automatic life sentence, but now may be resentenced to death under a retroactive application of a new resentencing law.

sentencing trial in which death may be imposed. Under the law that existed before this decision, any such individual whose offense occurred before July 16, 1985, had a right to a sentence of life imprisonment and could not be sentenced to death. This category potentially includes the thirty - one individuals whose death sentences were affirmed by the state court when "redetermination of the sentence on the conviction" was limited to imposition of a life sentence and who are now challenging the validity of their death sentences in state or federal collateral proceedings.

B. The decision below conflicts with this Court's decisions.

In **Kring v. Missouri**, 107 U.S. 221 (1883) this Court considered the constitutionality of a retroactive application of a state constitutional provision which was adopted after the commission of the homicide for which Kring was indicted. Kring was indicted for first degree murder and tried four times before a jury. During the next to last trial, he entered a plea of guilty to second degree murder and was sentenced to twenty-five years in the penitentiary. Kring appealed on the grounds that the plea was entered with the understanding that his sentence would not exceed ten years in prison. The judgment was reversed. On remand to the trial court for further proceedings, Kring refused to withdraw his plea to second degree murder. The trial court set the plea aside and directed the entry of a plea of not guilty to first degree murder. On this plea Kring was tried, convicted, and sentenced to death. At the time of Kring's alleged offense, Missouri law treated a conviction and sentence on second degree murder as an acquittal of first degree murder even if the second degree murder conviction was subsequently set aside. This law was changed by a constitutional amendment that became effective after the date of Kring's offense. Kring challenged the application of the constitutional amendment to his case as an **ex post facto** law. The Missouri court upheld the first degree murder conviction and death sentence on the basis of its conclusion that the change was "a change not in crimes, but in criminal procedure, and such changes are not **ex post facto**." **Kring v. Missouri**, 107 U.S. 221, 224 (1883),

Commenting on the state court's decision, this Court stated:

> Whatever may be the essential nature of the change, it is one which, to the defendant, involves the difference between life and death, and the retroactive character of the change cannot be denied.

Ibid. In response to the Missouri court's treatment of the "radical change in the law of Missouri to [Kring's] disadvantage" as a change in procedure, the Court addressed the meaning and significance of the term "procedure" in relation to the **ex post facto** prohibition. Asking itself the question: "...can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by **ex post facto** legislation, because, in the use of a modern phrase, it is called a law of procedure?", the Court answered: "We think it cannot." **Kring**, at 232. In conclusion, the court held that "any law passed after the commission of an offense which ... 'in relation to that offense, or its consequences, alters the situation of a party to his disadvantage,' is an **ex post facto** law; and ... '[n]o one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offence was committed, and which existed as a law at the time." **Id.** at 235.

Later decisions of the Court excluded from the **ex post facto** prohibitions changes "in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage." **Beazell v. Ohio**, 269 U.S. 167, 170 (1925). The same cases, however, reaffirmed the **Kring** principle that laws which deprive an accused of a "substantial right which the law gave him when the offense was committed" cannot avoid the proscription of the **ex post facto** clause by their characterization as "modes of procedure."[8]

As the Court of Criminal Appeals acknowledged in **Dutton v. Dixon**, the "new law" in this case, when applied to Mr. Cartwright, clearly removes an absolute bar to

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[8] See **Hopt v. Utah**, 110 U.S. 574 (1884) (removal of restrictions on the competency of convicted felons as witnesses did not increase punishment or affect other substantial rights); **Beazell v. Ohio**, 269 U.S. 167, 170 (1925) (law that made the right to separate trials discretionary with the judge did not abolish a defense that existed under the old law; it did not change the "definition of the offense or the punishment to be meted out", or otherwise affect substantial personal rights) and **Dobbert v. Florida**, 432 U.S. 282 (1977) (change in capital sentencing statute affected only the manner of procedure and as a whole was not disadvantageous to the defendant).

reimposition of the death sentence which existed at the time of the commission of his offense. Under the old law, Mr. Cartwright would now be sentenced to life, as are Dutton and all other individuals whose crimes were committed before July 16, 1985 and whose original death sentences were invalidated because of error in the capital sentencing proceeding. See Appendix at 26a. Under the new law, Mr. Cartwright can be sentenced to death, and under the old law he could not. Subjecting Mr. Cartwright to a possible death sentence when he would otherwise be entitled to a life sentence is certainly as onerous or detrimental as was the elimination of the bar to a possible death sentence that existed at the time of Kring's offense. In both cases the new law substantially increased the quantum of punishment which could be imposed on retrial under the old law (life imprisonment) to the possibility of a death sentence under the new law.

In **Lindsey v. Washington**, 301 U.S. 397 (1937), the Court considered retroactive application of a law which required the court to fix punishment at the maximum term and provided for possible earlier release through parole. The repealed law authorized imposition of a sentence within the maximum and minimum. The Washington Court rejected an **ex post facto** challenge declaring that "[t]he amending act does not change or inflict a greater punishment than the law in force when the alleged crime was committed ..." The Court rejected this analysis, stating:

> This Court, in applying the **ex post facto** prohibition of the Federal Constitution to state laws, accepts the meaning ascribed to them by the highest court of the state. But when their meaning is thus established, whether the standards of punishment set up before and after the commission of an offense differ, and whether the later standard is more onerous than the earlier within the meaning of the constitutional prohibition , are federal questions which this Court will determine for itself." **Cummings v. Missouri**, 4 Wall. 277, 320, 18 L.Ed. 356 ... **Kring v. Missouri** ... To answer them we compare **practical operation of the two statutes as applied to petitioner's offense**. [Emphasis supplied].

301 U.S. at 400. The Court concluded that when the standard of punishment imposed by the new law is more onerous or more severe than that of the old law and is "plainly to the substantial disadvantage" of the defendant, the new law is **ex post facto** if applied to persons whose offenses occurred before the adoption of the new law. **Id.** at 401-402. The fact that the petitioners in **Lindsey** were deprived of the possibility of a less severe

punishment than was available under the old, law imposed a standard that clearly operated to their detriment. In Mr. Cartwright's case, the new law depriving him of the mandatory life sentence to which he was entitled under the old law and increasing to death the punishment to which he could be subjected after his original death sentence was vacated is clearly more onerous than the old law and operates to his substantial detriment.

More recently, this Court held that changes in good time and gain time credits and changes in sentencing guidelines, when applied to cases in which the offense occurred prior to the changes, violated the **ex post facto** clause. **Weaver v. Graham**, 450 U.S. 24 (1981); **Miller v. Florida**, 482 U.S. 423 (1987). **Weaver** and **Miller** stressed the fact that the critical concerns of the **ex post facto** clause are "lack of fair notice **and** government restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." **Weaver**, 450 U.S. at 30 (emphasis added). **See Miller**, 107 S.Ct. at 2451. Also, both cases agreed that a statute which "alters penal provisions accorded by the grace of the legislature ... violates the [**ex post facto**] Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." 450 U.S. at 30. **See** 107 S.Ct. at 2451.

In **Weaver**, the challenged good time law "lengthen[ed] the period that someone in [Weaver's] position must spend in prison." 450 U.S. at 34. As applied to Weaver's case, the law was retroactive and more onerous than the law in effect at the time of his offense. Thus retroactive application was prohibited by the **ex post facto** clause.[9] In **Miller**, the new sentencing guidelines increased the presumptive range within which the sentencing judge had **unreviewable** discretion to fix a sentence for the offenses for which Miller was convicted. The new guidelines were clearly more onerous in that they foreclosed Miller's ability to challenge a sentence within the new presumptive range. Since the revised sentencing law increased the quantum of punishment applicable to Miller's offense and

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[9] The Court noted that "no **ex post facto** violation occurs if the change effected is merely procedural **and does 'not increase the punishment** nor change the ingredients of the offense or the ultimate facts necessary to establish guilt. [Citations omitted] Alteration of a substantial right, however, is not merely procedural, even if the statute takes a seemingly procedural form." 450 U.S. at 29, n. 12 (emphasis supplied). **See also Miller**, 107 S.Ct. at 2453 (quoting from **Weaver**).

directly and adversely affected the sentence Miller could receive, it was "void as applied to [individuals] whose crimes occurred before the law's effective date." 107 S.Ct. at 2454.

The critical question in all of these cases was whether punitive measures under the new law, when applied to the petitioners' cases, were more onerous than the punitive measures that would have been applied under the old law. Because the answer to that question in each case was yes, the new laws clearly affected rights regarding punishment and thus could not be considered "mere modes of procedure" which do not affect substantial rights and which are not covered by the **ex post facto** prohibitions.

C. **Confusion exists regarding the difference between changes in "mere modes of procedure" and changes affecting substantial personal rights.**

The significance of the term "procedural" was discussed at length in **Kring**, at 231. The Court commented that "the term 'procedure' is so broad in its signification that it is seldom employed in our books as a term of art." **Ibid**. Based on the common understanding of the word at that time, the Court concluded that "it [was] obvious that a law which is one of procedure may be obnoxious as an **ex post facto** law..." **Id.** at 232. In those cases in which the Court has upheld retroactive application of changes in the laws as affecting "mere modes of procedure," it has consistently reaffirmed the principle that the **ex post facto** clause "was intended to secure substantial personal rights against arbitrary and oppressive legislation", **Dobbert**, 432 U.S. at 293, and that a seemingly procedural change violates the Clause if it "alters a substantial right." **Miller**, 107 S.Ct. at 2453; **Weaver**, 450 U.S. at 29, n 12. Thus, recognizing that the "distinction between substance and procedure ... sometimes prove[s] elusive,"[10] **Miller**, 107 S.Ct. at 2453, the Court has steadfastly maintained the **Kring** position that laws which alter punishment or otherwise affect substantial personal rights to the detriment of the criminal defendant are within the parameters of the **ex post facto** clause "'even if the [law] takes a seemingly procedural form.'" **Ibid** (quoting **Weaver**, 450 U.S. at 29, n. 12).

[10] See also **Beazell v. Ohio**, 269 U.S. 167, 171 (1925) ("Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition.")

In attempting to apply the "elusive" distinction between procedural and substantive, lower courts have taken various approaches and sometimes have arrived at inconsistent results. In the first case in which the affect of Oklahoma's 1985 resentencing statute was considered, **Green v. State**, (decided October 9, 1985) the Oklahoma Court of Criminal Appeals acknowledged that "a procedural change which does not injuriously affect a substantial right to which an accused is entitled at the time of the offense is not **ex post facto** though retroactive; but it is otherwise if it does deprive him of a substantial right." 713 P.2d at 1041, n.4. The court concluded that the 1985 resentencing provision abolished "a substantial right -- the right of modification to life imprisonment for an appellant who suffered error in the second stage of trial -- and requires him to face the death penalty for a second time."[11] **Green**, 713 P.2d at 1041, n.4. Thus, when a individual's death sentence was invalidated because of sentencing stage errors and the offense occurred before July 16, 1985, a death sentence **could not** be imposed and a life sentence was mandatory. This holding and its underlying analysis were reaffirmed in **Dutton**.

These two decisions of the Oklahoma Court of Criminal Appeals are consistent with the Fifth Circuit's recent **ex post facto** analysis in **Youngblood v. Lynaugh**, 882 F.2d 956 (5th Cir. 1989). The change in Texas law considered in **Youngblood**, permits reformation of a sentencing verdict that includes a punishment not authorized by law. Under the law in effect at the time of Youngblood's offense, such a verdict was considered "void at its inception" and the offender was entitled to a new trial. **Id.** at 957. The **ex post facto** test as posed by the Fifth circuit was "whether Youngblood's right to retrial, to which he was entitled before the passage of art. 37.10(b), was a 'substantial protection' within the meaning of the Supreme Court's **ex post facto** jurisprudence." **Id.** at 959. Reviewing this Court's decisions, the Fifth Circuit concluded that "determination of the question whether a statute punishes a previously innocent act, or makes more burdensome the standard of proof, or eliminates a defense that was available at the time the act was committed cannot

[11] The old statute § 701.13(E)(2) required that if error occurred during the capital sentencing proceeding, the defendant was entitled to have his death sentence "set aside" and to have the case remanded "for modification of the sentence to imprisonment for life." **See Dutton v. Dixon**, 757 P.2d at 377.

be dispositive of the inquiry whether such a statute violates the **Ex Post Facto** clause. Instead, once it is determined that the change operates retroactively, the "salient issue [is] whether the law operated to disadvantage the accused in the exercise of a substantial right or protection that he previously enjoyed, not whether the circumstances of its application conform to a paradigmatic or illustrative category of harms." **Id.** at 959-960. Under this analysis the court held that the change in Texas law "altered [Youngbloods'] right to retrial – a substantive right – to his material disadvantage. As applied to Youngblood, therefore, art. 37.10(b) is **ex post facto**." **Ibid**. In a concurring opinion in **Youngblood**, Judge Edith H. Jones observed that "the distinction between 'mere modes of procedure' and substantial or vital procedural protections is a wobbly one under current Supreme Court jurisprudence." **Id.** at 961. She concluded that without further guidance, there were no "overriding principle from which to disagree with the ... conclusion that **this** procedural change so substantially affected the defendant's rights as to violate the **ex post facto** clause." **Id.** at 961. **See also id.** at 960 (Gee, concurring) (the Supreme Court's "modes of procedures" authority "constitutes more of a bright spectrum than a bright line."

In another Fifth Circuit decision, an ex post facto/due process analysis was applied to state judicial action abolishing a judicially created doctrine (carving doctrine) that could bar the petitioner's prosecution for attempted murder after a prosecution and conviction for kidnapping arising out of the same criminal transaction. **Rubino v. Lynaugh**, 845 F.2d 1266 (5th Cir. 1988). In **Rubino** the Fifth Circuit's analysis focused on the purpose of the "ban on **ex post facto** legislative or judicial action", **id.** at 1273, and on the effect of the abandonment of the "carving doctrine" on a person who would otherwise have been entitled to its benefit. **Id.** at 1274. The court swept aside the state's argument that Rubino had "fair warning" of the nature of the crimes and their punishment and focused on the goal of restraining arbitrary and vindictive action by the government:

> Courts and prosecutors may justifiably seek to punish criminals to the full extent of the law, but when they take advantage of changes in the law that put the defendant in a worse position than he was at the time of his crime, we may suspect, and disallow, vindictiveness.

Id. at 1273. **See also id.** at 1280 (King, concurring) (emphasizing principle of governmental restraint and Rubino's reliance interest in the law as it existed at the time of his offense).[12]

With regard to the affect of the change, the **Rubino** court observed that although the change "did not the lengthen the sentence applicable to any crime ... '[it] authorized multiple convictions and sentences in cases in which only one conviction and sentence would have been possible before." **Id.** at 1274. Thus persons in the same circumstance as Rubino were subjected to an increase in punishment from that punishment which could have been imposed under the old law. **Ibid.** The Fifth Circuit concluded that "[i]f the carving doctrine would have barred Rubino's second prosecution and conviction, the State deprived him of due process in affirming his conviction in reliance on the abandonment of a protective rule in force at the time of his offense." **Ibid.** In a concurring opinion, Judge King astutely observed that the clear intention of the change was to increase to the punishment that could be imposed on persons in Rubino's circumstances from that which was available under prior law. **Id.** at 1290.

In **Coleman v. Saffle**, 869 F.2d 1377 (10th Cir. 1989), the Tenth Circuit Court of Appeals considered the constitutionality of the retroactive application of a judicial enlargement of Section 701.13(F), an Oklahoma statute governing appellate review of a death sentence. Although the **ex post facto** clause applies to legislative actions, the court concluded that "'an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an **ex post facto** law.'" **Id.** at 1385 (quoting **Bouie v. City of Columbia**, 378 U.S. 347 (1964). Thus, the court applied "ex post facto principles to decide the due process issue." The change in **Coleman**, as viewed by the Tenth Circuit, was "the decision that death sentences are no longer automatically vacated when the jury has found an invalid aggravating circumstance." 869 F.2d at 1386. While acknowledging

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[12] Judge King also concluded that loss of the carving doctrine as a "potential defense" was substantially disadvantageous to Rubino and thus fell within the proscription of the ex post facto/due process doctrine. He characterized **Miller v. Florida** as "clearly establish[ing] that a denial of an otherwise established right to appellate review constitutes a 'substantial disadvantage' within reach of the **ex post facto** doctrine," 845 F.2d at 1279, and he compared that action to depriving Rubino of the right to challenge the trial court's disposition of his "carving doctrine" defense to the full extent permitted under prior law.

that the change disadvantaged the offender, the Tenth Circuit concluded that the change was "only a matter of procedure" and thus was not covered by the **ex post facto** prohibitions. As viewed by the Tenth Circuit, the challenged change concerned the manner in which the Oklahoma Court of Criminal Appeals determined the validity of a death sentence on direct appeal. After the Oklahoma court determines that a sentencing error invalidated the death sentence, another statutory provision, § 701.13(E)(2), controls the punishment which can be imposed upon resentencing. Until that resentencing provision (which is the subject of this petition) was amendment in 1985, the only punishment which could be imposed on resentencing was life. Engaging in a limited analysis of the change in the Oklahoma court's manner of appellate review, the Tenth Circuit primarily relied on its opinion in **United States v. Affleck**, 765 F.2d 944, 948 (10th Cir. 1985). **Affleck** concluded that under this Court's recent **ex post facto** cases a change in law that "'seriously disadvantages' a defendant is not prohibited by the Ex Post Facto Clause if it affects only matters of procedure and does not 'impose[ ] a punishment for an act which was not punishable at the time it was committed; or impose[ ] additional punishment to that then prescribed; or change[ ] the rules of evidence by which less or different testimony is sufficient to convict than was then required.' 765 F.2d at 948, 949 (quoting **Cummings v. Missouri**, 71 U.S. (4 Wall.) 277, 325-26, 18 L.Ed. 856 (1867))." 869 F.2d at 1386.[13] The Court discounted the fact that **Weaver** presented "the ex post facto test in terms of ... 'disadvantage[ ]'" to the offender. Also it did not address the language in **Weaver** and **Miller** which appears to reaffirm the **Kring** principle that changes affecting "substantial personal rights", (e.g. abolishing defenses, changing possible punishment to offender's substantial detriment),[14] cannot avoid **ex post facto** prohibitions even when the

[13] The language "seriously disadvantages" conflicts with the language in **Beazell v. Ohio** that describes those changes which are excluded as changes "in the mode of the trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in **a limited and unsubstantial manner to his disadvantage**." 269 U.S. at 170 (emphasis supplied).

[14] **Cf. Hicks v. Oklahoma**, 447 U.S. 343 (1980) (right to have jury rather than appellate court fix punishment is a substantial right that "substantially affects the punishment imposed", that cannot be deprived by characterizing it as a matter of state procedural law.)

change takes a seemingly procedural form. The **Coleman** panel concluded that the challenged judicial action "effected only a procedural change in the way the Oklahoma Court of Criminal Appeals carries out its statutorily-required review of death sentences", 869 F.2d at 1387, and thus could be retroactively applied to cases in which the offense occurred prior to the change.

In **Devine v. New Mexico Dept. of Corrections**, 866 F.2d 339 (10th Cir. 1989), the Tenth Circuit held that the New Mexico Supreme Court's construction and application of state parole statutes was unforeseeable and retroactively enhanced Devine's offense in violation of due process. The challenged action consisted of a judicial decision that Devine's parole eligibility was governed by a legislative amendment that established a minimum parole eligibility term of thirty years. However, the amendment was never codified and by all appearances was immediately repealed by another statutory provision that established a minimum parole eligibility term of ten years. In determining whether the **ex post facto** principles applied to judicial action, the court considered the twofold purpose behind a prohibition on **ex post facto** laws: "to restrain legislatures and courts from arbitrary and vindictive action and to prevent prosecution and punishment without fair warning." 866 F.2d at 344 (quoting **Rubino**, 845 F.2d at 1271). The court commented that in its view, "it is potentially as arbitrary and vindictive to retroactively enhance punishment for particular conduct, as it is to make particular conduct criminal." It concluded that "the underpinnings of the **ex post facto** clause compel applying it full force to courts when they enhance punishment..." 866 F.2d at 344-345.

The Tenth Circuit concluded that if the legislature had increased the minimum sentence without parole after Devine's offense it would have violated the **ex post facto** clause because it would have increased the time Devine would spend in jail before becoming eligible for supervised release.[15] The court considered the **Rubino** decision to

[15] The court noted that the circuits have differed in their treatment of retroactive application of stricter guidelines for granting of parole. It also observed that the majority of circuits take the position that where "guidelines merely channel the discretion of the parole authority they do not constitute ex post facto laws because they do not directly disadvantage particular defendants." 866 F.2d at 343, n. 7.

be "particularly instructive." It noted that while the Texas court's abandonment of the carving doctrine "did not make conduct criminal which was previously permitted ... [it] enhanced the degree of punishment to which certain offenders would be exposed for actions that violated multiple statutes." **Id.** at 344. Because the New Mexico court's decision was unforeseeable and had the effect of retroactively increasing the minimum parole eligibility term, thereby enhancing punishment, the court held that the decision violated due process.

On August 2, 1989, the Fourth Circuit rejected an **ex post facto** challenge to a retroactive application of an amendment to Virginia's capital sentencing statute. **Evans v. Thompson**, 881 F.2d 117 (4th Cir. 1989). Prior to the amendment, a person could only be sentenced to death in Virginia by the same jury that determined guilt. The new statute permitted resentencing before a new jury. According to the court's analysis of prior law and the resentencing amendment, "the change ... was merely an 'adjustment[ ] in the method of administering [petitioner's] punishment that [was] collateral to the penalty itself.'" 881 F.2d at 120 (quoting **Evans v. Commonwealth**, 323 S.E.2d 114, 119 (Va. 1984). The court concluded that old law gave fair notice that death was a possible penalty and that the amendment "neither increased the punishment attached to petitioner's crime, nor altered the ingredients of the offense, nor changed the ultimate facts necessary to establish petitioner's guilt." **Ibid**. Thus, the court held that the change did not violate the **ex post facto** clause. It equated the change in resentencing proceedings with circumstances in **Dobbert** and dismissed petitioner's reliance on **Kring** based upon an interpretation of the **Kring** opinion as "simply provid[ing] that if at the time of the offense, a defendant is on notice he can never be subject to a death sentence, imposition of a death sentence violates the **Ex Post Facto** Clause. " **Id.** at 120. The court did not discuss the effect the change had on possible punishment at resentencing.

Oklahoma law and the decision in Mr. Cartwright's case differ from **Evans**. The Court of Criminal Appeals has consistently construed the pre-1985 version of § 701.13(E)(2) as bestowing upon a particular group of capital defendants the right to a life

sentence and as creating a bar to the possibility of being resentenced to death. **See Green, Chaney, Dutton**. In **Evans**, Virginia's death penalty statutes apparently were not construed as directly requiring imposition of life after a death sentence was set aside. Instead, the Virginia court held that the "statutory framework existing at the time inhibited a remand for a new trial limited to the penalty issue only" because, under the Virginia capital murder statutes, the same jury that decided guilt must also fix punishment. **Evans v. Commonwealth**, 323 S.Ed. 2d 114, 117 (Va. 1989). Considering this difficulty, the court had, in the past, "commuted" an invalid death sentence to life imprisonment. **Ibid**. citing **Patterson v. Commonwealth**, 283 S.E. 2d 212 (Va. 1981).

This case likewise differs from **Dobbert**. Mr. Cartwright does not assert a right to a life sentence because of the invalidity of a pre-existing capital sentencing statute. Instead, his claim to a life sentence is based upon a specific statutory provision, Okla. Stat. tit. 21, § 701.13(E)(2) (1981) that provides for a life sentence and that precludes a reimposition of the death sentence. Neither does he merely complain that the new "procedures" are more onerous or disadvantageous, but that the maximum potential sentence (death) he is exposed to under the new resentencing law is more onerous than the mandatory sentence (life) under the old resentencing law, regardless of the procedures.

D. A judicial change in the construction of a statute which abolishes an antecedent right to an automatic life sentence on resentencing raises substantial constitutional questions about fundamental fairness and due process of law.

There can be no question that under Oklahoma law as it was then construed, Mr. Cartwright was entitled to an automatic life sentence when the United States District Court for the Eastern District entered its order declaring Mr. Cartwright's death sentence constitutionally invalid. **See Dutton**. That law did not change (and Mr. Cartwright's right to an automatic life sentence was not abridged) until the Oklahoma Court of Criminal Appeals rendered its decision in this case. The decision in this case not only reversed the court's previous **ex post facto** position regarding a retroactive application of the 1985 resentencing statute; it also abandoned its reliance on a state statutory provision that controls retroactivity of criminal statutes, Okla. Stat. tit. 22, § 3 (1981), and it departed

from a long line of Oklahoma decisions which were consistent with the clear language of the statute.[16]

The decision in this case was clearly not a mere correction of obvious errors in a previous decision, and it certainly was not dictated by any of the court's prior decisions. In fact, the drastic departure from its prior construction of Oklahoma law more resembles legislative action than it does traditional judicial functions. The court did not decide that its previous interpretation of § 3 was erroneous or that the statutory provision does not apply to the resentencing provision; neither did the court conclude that it had erroneously construed previous Oklahoma decisions dealing with retroactive application of statutes. Instead the Oklahoma court decided to "adopt the statutory [sic] exception to the general rule of nonretroactivity, enunciated by the Utah Supreme Court ... which allows procedural remedial statutes to apply to pending actions." 778 P.2d at 482. The court continues by explaining that "a case is pending from the time of its commencement until its final determination upon appeal." One would assume the court was referring to the completion of the direct appeal, but apparently that was not the case considering the fact that Mr. Cartwright's direct appeal was completed before the adoption of the new resentencing law.

Discussing the effect of the change, the court ignored the fact that the old law mandated a life sentence and that the new law permits a death sentence. The court stated: "the amendment may or may not affect the outcome when petitioner is resentenced, depending upon the sentencer's determination after properly weighing the mitigating and aggravating circumstances." 778 P.2d at 483.

This decision raises questions of fundamental fairness that parallel the concerns underlying the **ex post facto** prohibitions. "From the outset ... the ex post facto clauses have been understood to have been principally aimed at curtailing legislative abuses." **Warren**

[16] In **Dutton**, both the statute and the cases were relied on for the principle that a legislative enactment will not be considered retroactive unless the legislature expressly so provides. The statutory provision, § 3, is codified in Title 22, Code of Criminal Procedure, and was construed by the Oklahoma court as applying to the laws contained in Titles 21 and 22.

v. United States Parole Commission, 659 F.2d 183, 187 (D.C. Cir. 1981). **See also Rubino**, 845 F.2d at 1273 and 1280; and **Devine**, 866 F.2d at 343-344.

Considering the purpose of the **ex post facto** clause and its application to an extension of a statute of limitations, Justice Learned commented:

> The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest.

Falter v. United States, 23 F.2d 420, 425-426 (2d Cir. 1928) **cert. denied** 277 U.S. 590 (1978). In **James v. United States**, 366 U.S. 213, 247 n. 3 (1961), Justice Harlan observed:

> [T]he policy of the prohibition against ex post facto legislation would seem to rest on the apprehension that the legislature, in imposing penalties on past conduct, ... (as for instance when the penalty is increased retroactively on an existing crime), may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons.

The concerns thus expressed about the dangers of abuse and the need for restraint on legislative actions apply with equal force to judicial action which is restrained by application of the due process clause. **See North Carolina v. Pearce**, 395 U.S. 711, 725 (1969) ("Due process of law ... requires that vindictiveness against a defendant for having successfully attached his first conviction must play no part in the sentence he receives after a new trial). **See also Coleman v. McCormick**, 874 F.2d 1280 (9th Cir. 1989) (retroactive application of new sentencing provision violated due process because of reasonable and detrimental reliance on old law) **Adamson v. Ricketts**, 865 F.2d 1011 (9th Cir. 1989) (addressing possibility of vindictive increase in punishment).

Numerous **ex post facto** decisions have alluded to the concerns of due process and have suggested circumstances which should be considered in determining when government action (legislative or judicial) exceeds permissible bounds.[17] Discussing the role of the **ex post facto** and due process clauses in restraining legislatures and courts "from arbitrary and vindictive actions", the Fifth Circuit observed that when courts and prosecutors "take

[17] In **Breest v. Helgemoe**, 579 F.2d 95 (1st Cir. 1978) the First Circuit suggested that unforeseeable changes in parole eligibility standards that occur after a substantial lapse of time and which frustrate a prisoner's reasonable expectation for release far beyond that originally set "might be fundamentally unfair, and thus violative of due process." **Id.** at 101.

advantage of changes in the law that put the defendant in a worse position than he was at the time of his crime, we may suspect and disallow vindictiveness." **Rubino**, 845 F.2d at 1273. Also, courts have acknowledged that the potential for vindictive use of retroactive lawmaking increases when because of the retroactive aspects of the changes, the persons adversely affected are clearly identified before the change. **See Warren v. United States Parole Commission**, 659 F.2d 183, 195 (D.C. Cir. 1981) (with respect to statute depriving prisoners of good time, lawmakers know which current prisoners will be so deprived, thereby creating risk of legislative abuse).[18]

The authors of the **ex post facto** clause recognized that the potential for vindictive and punitive action is inherent in certain government powers, e.g. the power to adopt retroactive laws establishing more onerous standards of punishment for a specific category of offenders. "Since judicial inquiry into the motives of the legislature is difficult and unseemly," it was reasonable and wise for the framers to ban such legislation. **Warren** at 189. Such inquiries into the motives behind judicial actions are even more "difficult and unseemly" and thus the potential for arbitrary and vindictive action on the part of the judicial branch calls for protections just as great.[19]

This Court should grant certiorari to provide guidance to the lower courts in determining the parameters of due process restrictions on judicial decisions that affect antecedent rights of criminal defendants to apply changes.

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[18] In **Warren**, the court held that the changes did not violate the ex post facto clause. The category of prisoners to which Warren belonged was not disadvantaged by the new guideline system and under the circumstances of the case, "no one in Warren's position could have been unfairly singled out for vindictive or malicious condemnation." 659 F.2d at 194.

[19] Decisions that address the retroactivity of statutes not controlled by the **ex post facto** clause also provide guidelines for due process purposes. **See United States v. Fernandez-Toledo**, 749 F.2d 703 (11th Cir. 1985) ("It would be manifestly unjust to apply the new substantive law to the appellees because they were entitled to be released and their release was ordered ... before the new law became effective...Their rights to bail had already vested." **Id.** at 705.

E. Subjecting Mr. Cartwright to a possible death sentence under the Court of Criminal Appeals decision in his case raises equal protection questions.

Mr. Cartwright and an identifiable group of capital defendants have been singled out by the Oklahoma court's decision for special and more onerous treatment upon vacation of an invalid death sentence than other capital defendants similarly situated. There is no rational basis for distinguishing Mr. Cartwright's case and the other cases pending in federal court in which unconstitutional death sentences may be vacated from those cases in which the Oklahoma court has applied the pre-1985 resentencing statute after invalidation of a death sentence and required modification to life. To draw a line at the date on which Mr. Cartwright's case was decided (July 31, 1989) so that all persons whose death sentences were vacated before that date (except Mr. Cartwright) receive the benefit of the old law where as all persons whose death sentences are vacated after July 31, 1989 (including Mr. Cartwright) are subjected to a possible death sentence is arbitrary and bear no rational relation to any legitimate state purpose. The law which is being retroactively applied was passed in July of 1985 and numerous persons whose cases were decided after that date have received the benefit of the old law because of the Oklahoma court decision that the 1985 statute was not retroactive. Persons whose death sentences have been vacated by the federal courts before July 31, 1989 (except Mr. Cartwright) received the benefit of the old law and were sentenced to life. There is no rational basis for distinguishing Mr. Cartwright's case from theirs. **Cf. Baxstrom v. Herold**, 383 U.S. 107 (1966).

The equal protection clause was intended to ensure that similarly situated persons received similar treatment and to prevent disfavored classes from being singled out for worse or less beneficial treatment. **Cf. Griffith v. Kentucky**, 107 S.Ct. 708, 712-14 (1987). The facts before this court call out for a standard of equality which can counteract the potential for abusive and vindictive treatment directed toward a particular group or individual.

CONCLUSION

For all the above and foregoing reasons, Petitioner submits that the Court should grant a writ of certiorari to address the important constitutional issues raised by the retroactive application of a change in the resentencing law in this case.

Respectfully submitted,

MANDY WELCH
Deputy Appellate Public Defender

MARK BARRETT
Assistant Appellate Public Defender

By: Mandy Welch
MANDY WELCH
Deputy Appellate Public Defender
1660 Cross Center Drive
Norman, Oklahoma 73019
(405) 325-3331

Counsel for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

WILLIAM THOMAS CARTWRIGHT,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

APPENDIX

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CARTWRIGHT V. STATE,
778 P.2d 479 (Okl.Cr. 1989)

William Thomas CARTWRIGHT, Petitioner,

v.

STATE of Oklahoma, Respondent.

No. H-88-820.

Court of Criminal Appeals of Oklahoma.

July 31, 1989.

Postconviction defendant, whose death sentence was invalidated in federal habeas proceeding, filed application for writ of habeas corpus and modification of invalid death sentence to life imprisonment. The Court of Criminal Appeals, Bussey, J., held that: (1) defendant could be resentenced without violating due process or ex post facto principles, and (2) amended statute, which allows Court of Criminal Appeals to set aside death sentence when error found during sentencing stage of trial and remand case for resentencing by trial court, is procedural statute with no substantive effect on crime, and thus, provision of code of criminal procedure stating that no part of code is retroactive unless expressly so declared did not prohibit application of amended sentencing statute on remand.

Remanded for resentencing.

Lumpkin, J., filed specially concurring opinion.

Parks, P.J., filed dissenting opinion.

1. Constitutional Law ⇐199
Criminal Law ⇐1206.1(2)

Amended statute allowing Court of Criminal Appeals to set aside death sentence when error is found during sentencing stage of trial and remand of case for resentencing by trial court does not violate ex post facto prohibition. U.S.C.A. Const. Art. 1, § 10, cl. 1; 21 O.S.Supp.1985, § 701.13, subd. E, par. 2.

2. Constitutional Law ⇐199

Ex post facto clause does not prevent State from depriving criminal defendant of expectation to procedure that has not yet accrued to his benefit. U.S.C.A. Const. Art. 1, § 10, cl. 1.

3. Constitutional Law ⇐199
Criminal Law ⇐1206.1(2)

Criminal defendant, whose death sentence had been vacated as invalid by the federal habeas court, could be resentenced, without violating due process or ex post facto principles, under amended statute which allows Court of Criminal Appeals to set aside death sentence when error is found during sentencing stage of trial and remand for resentencing by trial court. U.S.C.A. Const. Art. 1, § 10, cl. 1; Const. Amend. 14; 21 O.S.Supp.1985, § 701.13, subd. E, par. 2.

4. Criminal Law ⇐1206.3(2)

Amended statute, which allows Court of Criminal Appeals to set aside death sentence when error is found during sentencing stage of trial and remand case for resentencing by trial court, is procedural statute with no substantive effect on crime, and thus, provision of code of criminal procedure stating that no part of code is retroactive unless expressly so declared did not prohibit application of amended sentencing statute on remand; overruling *Dutton v. Dixon* 757 P.2d 376. 21 O.S.Supp.1985, § 701.13, subd. E, par. 2; 22 O.S. 1981, § 3.

Mandy Welch, Deputy Appellate Public Defender, Norman, for petitioner.

Robert H. Henry, Atty. Gen., Susan Stewart Dickerson; Asst. Atty. Gen., Oklahoma City, for respondent.

OPINION

BUSSEY, Judge:

On October 4, 1988, petitioner filed an application for a writ of Habeas Corpus and Modification of Invalid Death Sentence to Life Imprisonment in Muskogee County District Court Case No. CRF-82-192. On November 16, 1988, oral argument on the matter was held before this Court.

I.

PROCEDURAL BACKGROUND

Petitioner was tried by jury and convicted of First Degree Murder and sentenced to death on October 25, 1982. Petitioner's first degree murder conviction and sentence of death was affirmed on direct appeal. *Cartwright v. State*, 695 P.2d 548 (Okl.Cr.1985), *cert. denied*, 473 U.S. 911, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985). Petitioner's appeal from denial of state post-conviction relief was denied. *Cartwright v. State*, 708 P.2d 592 (Okl.Cr.1985), *cert. denied*, 474 U.S. 1073, 106 S.Ct. 837, 88 L.Ed.2d 808 (1986). His petition for a writ of habeas corpus in the United States Dis-

trict Court for the Eastern District of Oklahoma was denied. The Tenth Circuit Court of Appeals affirmed the denial of habeas corpus relief in *Cartwright v. Maynard*, 802 F.2d 1203 (10th Cir.1986). Following rehearing en banc, however, petitioner's death sentence was vacated by the Tenth Circuit's holding that Oklahoma's aggravating circumstance that a murder was especially heinous, atrocious, or cruel was being applied in an unconstitutionally vague and overbroad manner. *Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir.1987). The Tenth Circuit directed the district court "to enter judgment that the writ of habeas corpus is denied but as law and justice require, the death sentence of petitioner is invalid under the Eighth and Fourteenth Amendments to the United States Constitution." The Tenth Circuit further stated that the judgment was without prejudice to further proceedings by the State for redetermination of the sentence on the conviction. *Id.* at 1492. Finally, the Tenth Circuit expressed "no opinion concerning the constitutionality of a retroactive application of Oklahoma's [resentencing] procedure." *Id.* at 1492 n. 8. The State of Oklahoma appealed to the United States Supreme Court which delivered a unanimous opinion upholding the opinion of the Tenth Circuit. *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). The Supreme Court also declared that its judgment was without prejudice to further proceedings in the state courts for redetermination of the appropriate sentence. *Id.* at 486 U.S. ——, 108 S.Ct. at 1860, 100 L.Ed.2d at 383.

II.

In *Stouffer v. State*, 742 P.2d 562, 563–64 (Okl.Cr.1987) (Opinion on Rehearing), this Court reconsidered 21 O.S.1981, § 701.13(F), and held that it had the authority to independently reweigh aggravating and mitigating circumstances when, on appellate review, an aggravating circumstance found by the jury was determined to be invalid. We stated that such a review was implicit in this Court's obligation to make a factual substantiation of the verdict and determination of the validity of the sentence. *Id.* Prior to *Stouffer*, this Court had, when finding an error during the sentencing stage of trial, automatically modified the sentence to life imprisonment.

In *Castro v. State*, 749 P.2d 1146, 1150 (Okl.Cr.1987) (Opinion on Rehearing), this Court discussed the *ex post facto* aspects of *Stouffer*. We stated that the principles set forth in *Stouffer* did not deprive [defendants] of a defense which was previously available, or change the legal definition of the offense, or the punishment to be meted out, or affect the criminal quality of the act charged, or change the questions which may be considered by the jury in establishing guilt or innocence. *Castro*, at 1151. Finally, quoting *Dobbert v. Florida*, 432 U.S. 282, 293–94, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977), this Court asserted that procedural changes in a statutory capital sentencing scheme which simply alter the methods employed in determining whether the death penalty was to be imposed is not *ex post facto* even though it may work to the disadvantage of a defendant. *Id.* at 1150.

In *Dutton v. Dixon*, 757 P.2d 376, 381 (Okl.Cr.1988), a majority of this Court held that 21 O.S.Supp.1985, § 701.13(E)(2), which allows this Court to set aside a death sentence when error is found during the sentencing stage of trial and remand the case for resentencing by the trial court, cannot be applied retroactively. The prior statute automatically modified the sentence to life imprisonment if error was found in the sentencing stage. *See* 21 O.S.1981, § 701.13(E)(2). The *Dutton* court stated that "the retroactive application of the 1985 resentencing amendment of Section 701.13(E)(2) ... would constitute a violation of the Federal and Oklahoma Constitutions as an *ex post facto* application of a law which inflicts a greater punishment than the law annexed to the crime at [the] time it was committed or alters [the] situation of [an] accused to his disadvantage." *Id.* at 381. The majority concluded, "[w]hile the 1985 resentencing amendment may appear to take a seemingly procedural form, in its practical operation it deprives the petitioner

of a substantial right, and ... it is therefore *ex post facto*." *Id.* at 381.

We find the *ex post facto* analysis applied in *Castro* to be highly inconsistent with the *ex post facto* analysis applied in *Dutton*. *Castro* held that the retroactive application of a judicial interpretation of a statute, denying defendants automatic modification to life imprisonment, does not violate the *ex post facto* prohibition, while *Dutton* held that the retroactive application of a statute providing for resentencing violates *ex post facto* principles because it deprives defendants of a substantial right, i.e., automatic modification to life imprisonment.

III.

In *Coleman v. Saffle*, 869 F.2d 1377 (10th Cir.1989), the Court stated that changes in the law by judicial construction implicate the Due Process Clause while the prohibition against *ex post facto* laws concerns legislative enactments. However, the Court applied *ex post facto* principles in deciding the due process issues of *Stouffer* because an unforseeable judicial enlargement of a criminal statute operates precisely like an *ex post facto* law. *Id.* at 1385. The Court stressed that the relevant inquiry in *ex post facto* analysis is whether the change impairs "substantial personal rights," or merely changes "modes of procedure which do not effect matters of substance."

In *Coleman*, the Court stated that an offender does not win an *ex post facto* argument by proving disadvantage alone. *See also Dobbert v. Florida*, 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977). The Court declared that the true focus of *ex post facto* analysis is on (1) the elements of the offense, (2) the conditions and quantum of punishment, and (3) the quantity and degree of proof necessary to establish guilt. *See also United States v. Affleck*, 765 F.2d 944, 948 (10th Cir.1985); *Beazell v. Ohio*, 269 U.S. 167, 170, 46 S.Ct. 68, 68–69, 70 L.Ed. 216 (1925).

[1] We find that the amended statute allowing for resentencing does not violate the prohibition of *ex post facto*. As applied to the petitioner, the crime for which he was charged, the punishment prescribed therefor, and the quantity or degree of proof necessary to establish guilt, all remain unaffected by the amended statute. *See Miller v. Florida*, 482 U.S. 423, 433–34, 107 S.Ct. 2446, 2452, 96 L.Ed.2d 351, 362 (1987). Even on remand, petitioner faces the same possible punishment as before: life imprisonment or death. We therefore find the new sentencing amendment to be a procedural change in the law, and not prohibited by the *ex post facto* prohibition.

[2, 3] We also find the argument in *Dutton*, that defendants had a "right" to a mandatory sentence of life imprisonment if error was found in the sentencing stage of trial, to be inaccurate. Defendants may have had expectations that their sentences would automatically be modified to life imprisonment, but the *ex post facto* clause does not prevent the State from depriving a criminal defendant of an expectation as to a procedure that has not yet accrued to his benefit. *See State v. Norton*, 675 P.2d 577 (Utah 1983). We hold that petitioner can be resentenced under the amended statute without violating due process or the *ex post facto* prohibition of either the Oklahoma or Federal Constitutions.

IV.

[4] With regard to statutory construction and retroactivity, 22 O.S.1981, § 3 provides: "No part of this code is retroactive unless expressly so declared." In *Dutton*, the majority held that since the amendment contained no express language indicating its retroactive effect, it can only apply prospectively. *Dutton*, at 381. However, we find that we should adopt the statutory exception to the general rule of nonretroactivity, enunciated by the Utah Supreme Court in *State v. Norton*, *supra*, which allows procedural remedial statutes to apply to pending actions. For purposes of the exception, a case is pending from the time of its commencement until its final determination upon appeal. *Norton*, at 585. As we have already determined, the resentencing amendment is procedural, as

it has no substantive effect on petitioner's crime. The amendment may or may not affect the outcome when petitioner is resentenced, depending upon the sentencer's determination after properly weighing the mitigating and aggravating circumstances. Accordingly, 22 O.S.1981, § 3 does not prohibit application of the amended sentencing statute on remand. To the extent *Dutton v. Dixon*, 757 P.2d 376 (Okl.Cr.1988) is inconsistent with this opinion, it is hereby expressly overruled.

Finally, we are aware that 21 O.S.1981, § 701.10 appears to require that capital defendants be sentenced by the same jury that convicted them. However, statutes are to be construed so as to effectuate their purpose. *Owens v. State*, 665 P.2d 832, 834 (Okl.Cr.1983). Moreover, the more recent enactment, Section 701.13(E)(2) controls over Section 701.10. *See Delfrate v. State*, 732 P.2d 900, 902 (Okl.Cr.1987). Thus, we find that Section 701.13(E)(2) authorizes this Court to remand a capital case for resentencing before a new jury or before the trial judge, whichever is applicable.

V.

We therefore hold that Case No. CRF-82-192 must be REMANDED to Muskogee County District Court for RESENTENCING pursuant to 21 O.S.Supp.1985, § 701.13(E)(2).

LANE, V.P.J., and BRETT, J., concur.

LUMPKIN, J., specially concurs.

PARKS, P.J., dissents.

LUMPKIN, Judge, specially concurring.

I concur with the Court's opinion on this case and write to further address the application of 22 O.S.1981, § 3. Title 22 O.S. 1981, § 1, provides: "This chapter shall be known as the code of criminal procedure of the State of Oklahoma." Title 22 O.S.1981, § 3 applies to the code of criminal procedure. Title 21 O.S.1981, § 1, provides: "This chapter shall be known as the penal code of the State of Oklahoma." The provisions of Title 21, Oklahoma Statutes, must be interpreted under the *ex post facto* prohibition of either the Oklahoma or Federal Constitutions. Title 22 O.S.1981, § 3 is not applicable to the penal code of the State of Oklahoma contained in Title 21, Oklahoma Statutes.

PARKS, Presiding Judge, dissenting.

I dissent for the reasons stated in my opinion in *Dutton v. Dixon*, 757 P.2d 376 (Okla.Crim.App.1988). I would emphasize that under 22 O.S.1981, § 3, the resentencing provision codified at 21 O.S.Supp.1985, § 701.13(E)(2), is not to be applied retroactively "unless expressly so declared." Because retroactivity was not "expressly so declared" by the Oklahoma Legislature, the resentencing amendment should not be applied retroactively. *Dutton*, 757 P.2d at 381.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
AUG 21 1989
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILLIAM THOMAS CARTWRIGHT,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondents.

Case No. H-88-820

PETITION TO AMEND JUDGMENT BY REQUIRING MODIFICATION OF SENTENCE TO LIFE IMPRISONMENT UNDER 21 O.S. 1981 § 701.13(E)(2), OR IN THE ALTERNATIVE, MOTION TO VACATE THAT PORTION OF THE COURT'S JUDGMENT WHICH SUBJECTS PETITIONER TO A POSSIBLE DEATH SENTENCE AND TO SCHEDULE CASE FOR ORAL ARGUMENT ON THE RETROACTIVE APPLICATION OF THE 1985 AMENDMENT TO § 701.13(E)(2) TO THIS CASE

On July 31, 1989, this court entered judgment in the above styled cause remanding Case No. CRF-82-192 to the Muskogee County District Court for resentencing under 21 O.S. Supp. 1985, § 702.13(E)(2) (as amended effective July 16, 1985) thereby reversing the court's previous holdings in **Green v. State**, 713 P.2d 1032, 1038 (Okl.Cr. 1985) and **Dutton v. Dixon**, 757 P.2d 376 (Okl.Cr. 1988) that the 1985 resentencing statute, § 702.13(E)(2), was not retroactive. For the reasons set forth below, Mr. Cartwright respectfully requests that the court amend its judgment by requiring a modification of sentence to life imprisonment in accordance with the provisions of 22 O.S. 1981 §

701.13(E)(2) (before the 1985 amendment). In the alternative, Mr. Cartwright requests that the court vacate that portion of its judgment that permits the imposition of a death sentence and schedule oral argument on the retroactive application of § 702.13(E)(2), as amended in 1985, to Mr. Cartwright's case.

REASONS THE COURT SHOULD RECONSIDER ITS RETROACTIVE APPLICATION OF § 702.13(E)(2)

A. A retroactive application of § 702.13(E)(2) in Mr. Cartwright's case without notice that the court was reconsidering its previous holdings in *Dutton v. Dixon*, and *Green v. State* and without giving the parties an opportunity to be heard on the matter violates fundamental fairness guaranteed by Article 2, Section 7 of the Oklahoma Constitution and the Fourteenth Amendment of the United States Constitution.

The court's decision to remand Mr. Cartwright's case for resentencing under the amended version of § 701.13(E)(2) instead of requiring modification to life under the pre-1985 version hinges on its decision to reverse its earlier holdings in **Green** and **Dutton** and the judicial creation of an exception to 22 O.S. 1981, § 3. If either of these actions was incorrect, Mr. Cartwright is being wrongfully deprived of his right to be resentenced to life and is being wrongfully subjected to the possibility of a death sentence. Furthermore, even when a court clearly has the authority to act, "it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause." **Evitts v. Lucey**, 469 U.S. 387, 401, 105 S.Ct. 830, 839 (1985). At a minimum, the guarantee of due process requires that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." **Boddie v. Connecticut**, 401 U.S. 371, 377, 91 S.Ct. 780, 786 (1971).

The Due Process Clause was designed to protect individuals against lawless and arbitrary actions by the state. **City of Edmond v. Wakefield**, 537 P.2d 1211, 1213 (Okla. 1975). The most "'fundamental requisite of due process is the opportunity to be heard . . . at a meaningful time and in a meaningful manner.'" **Goldberg v. Kelly**, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020 (1970). A meaningful opportunity to be heard necessarily requires that the an individual have notice of the issues being considered and the legal principles being applied and an opportunity to address the application of those principles to his case in an adversarial proceeding. "[D]eprivation of life, liberty or property by adjudication [must be preceded] by notice and opportunity for hearing appropriate to the nature of the case." **Id.**, quoting from **Mullane v. Central Hanover Bank & Trust Co.**, 339 U.S. 306, 70 S.Ct. 652, (1950).

When Mr. Cartwright filed this action to obtain a valid and proper sentence under Oklahoma law, he was clearly entitled to a life sentence under the established laws of this state. **See Dutton.** At no time in these proceedings did the State challenge the validity of **Dutton** or ask the court to reverse its holding in **Dutton**. Neither did this court ever suggest to the parties that it was in fact reconsidering its holding in **Dutton** or that it was considering adopting an exception to the nonretroactivity provisions of 22 O.S. 1981 § 3. Under these circumstances, Mr. Cartwright was deprived of "a substantial right" to a life sentence, **Green v. State**, 713 P.2d at 104, n.4 and **Dutton v. Dixon**, 757 P.2d at 381, without notice that the court was reconsidering established law and without an opportunity to be heard on the matter. In short, Mr. Cartwright was deprived of his "substantial right

to a life sentence" without due process of law. In the process, important arguments based on constitutional and statutory provisions against retroactive application of the amended resentencing provision were overlooked. Rendering a decision of such monumental significance without the most thorough and thoughtful analysis possible gives the appearance of arbitrariness and caprice, and in a death penalty case by itself calls into question the validity of the court's decision.

"As [the United States Supreme Court] ha[s] often stated, there is a significant constitutional difference between the death penalty and lesser punishments:

> '[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.' **Gardner v. Florida**, 430 U.S. 349, 357-358, 97 S.Ct. 1197, 1204 51 L.Ed.2d 393 (1977)(opinion of Stevens, J.)."

Beck v. Alabama, 100 S.Ct. 2382, 2389-90 (1980).

The court's decision in this case turns on an analysis and construction of constitutional principles, statutory provisions, and court decisions that were never addressed by the parties. Such a review is equivalent to the **ex parte** preliminary appellate review in **Douglas v. California**, 372 U.S. 353, 357, 83 S.Ct. 814, 816 (1963), which the Supreme Court determined did not "comport with fair procedure." In essence, the court has singled out Mr. Cartwright for different treatment without giving him an opportunity to be heard

on the reasons he should receive the same treatment accorded defendants who were tried and sentenced to death during the same period of time.

When an individual has been denied due process, he is entitled to be restored to "the position he would have occupied had due process of law been accorded to him in the first place." **Armstrong v. Manzo**, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965). This can only be done by vacating that portion of the judgment that permits imposition of another death sentence and by permitting Mr. Cartwright to be heard on the retroactive application of the 1985 resentencing amendment.

B. By reversing *Green* and *Dutton* and by a retroactive application of a judicially created exception to the nonretroactivity statute, this court deprived Mr. Cartwright of an accrued right to have his sentence modified to life imprisonment in violation of due process of law and in violation of Sections 52 and 54 of Article 5 of the Oklahoma Constitution.

At all stages of Mr. Cartwright's case:

1. When he was tried - October, 1982;
2. When his case was decided on direct appeal - January 7, 1985;
3. When the Supreme Court denied certiorari - July 1, 1985;
4. When the Tenth Circuit invalidated his death sentence -June 22, 1987;
5. When the Supreme Court affirmed the Tenth Circuit's decision - June 6, 1988;
6. When the United States District Court entered its final judgment invalidated Mr. Cartwright's death sentence - August 4, 1988;
7. When Mr. Cartwright petitioned this court for relief from his invalid death sentence - October 4, 1988;

he had a right under the laws of this State and the decisions of this court to a life sentence. Before July 16, 1985, when a death sentence was determined to be invalid, 21 O.S. 1981 § 701.13(E)(2) required that the case be "remand[ed] ...for modification of the sentence to imprisonment for life." See **Johnson v. State**, 665 P.2d 815, 826-27 (Okl.Cr. 1983) (on rehearing); and **Chaney v. Brown**, 699 P.2d 159, 161 (Okl.Cr. 1985) (holding that § 701.13(E) "allow[ed] this Court one remedy only if error has tainted the validity of the sentencing stage of trial, and that [was] to modify the sentence to life imprisonment"). On October 9, 1985 (after the effective date of the 1985 amendment to § 702.13(E)(2)) this court vacated the death sentence of Danny George Parker and remanded the case for modification of the sentence to life imprisonment. **Green v. State**, 713 P.2d 1032, 1043 (Okl.Cr. 1985). In **Green**, with regard to Parker's case, this court held that if applied retroactively, the 1985 amendment would deprive Parker of "a substantial right---the right of modification to life imprisonment for an appellant who suffered error in the second stage of trial---and require[ ] him to face the death penalty for a second time." 713 P.2d at 1041 n. 4. The court applied the resentencing legislation in effect "at the time [Parker's] appeal was filed", **Id.** at 1041, and remanded the case for modification to life. **Id.** at 1043. This court did not address the retroactivity of the 1985 resentencing amendment again until it decided **Dutton v. Dixon** on May 25, 1988.

In **Dutton**, this court again held that retroactive application of the 1985 amendment would deprive an individual with an invalid death sentence of a substantial right in

violation of the **ex post fact** clause, and, in addition, that the amended statute was not retroactive under 22 O.S. 1981 § 3. 757 P.2d at 378-381.

Thus, when the 10th Circuit Court of Appeals invalidated Mr. Cartwright's death sentence on June 22, 1987, and when that decision was affirmed by the Supreme Court on June 6, 1988, the 1985 amendment was not applicable to his case. Under the applicable statute, Mr. Cartwright's case could only be remanded "for modification of the sentence to imprisonment for life", 21 O.S. 1981 § 701.13(E)(2). He could not be resubjected to the possibility of another death sentence. This was the status of Oklahoma law when Cartwright filed this action seeking relief in this court from his invalid death sentence.

Regardless of the correctness of the court's decision with respect to **ex post facto** prohibitions, when Mr. Cartwright's death sentence was invalidated and when he petitioned this court for modification of his sentence to life, the amended resentencing statute was **not applicable** to his case **under the decisions of this court** interpreting the laws of the State of Oklahoma. Thus, as a matter if fact, when this court held on July 31, 1989, that retroactive application of the resentencing statute would not violate **ex post facto** prohibitions and when it adopted an exception to the statutory proscription on retroactivity, it amended the amendment to the resentencing statute so as to make it applicable to Mr. Cartwright's case. The court's decision changed in mid-stream Mr. Cartwright's available sentence from a mandatory life sentence to the possibility of a death sentence. Mr. Cartwright was thereby deprived of a right which had clearly accrued before the judicial amendment of the law - his death sentence was invalid and he was entitled to a life

sentence. When this court changed the law he then became subject to another death sentence. The fundamental unfairness of applying this judicial amendment of the resentencing statute retroactively to Mr. Cartwright's case violates due process of law and the clear intent of Sections 52 and 54 of Article 5 of the Oklahoma Constitution.

1. **Retroactive application of the court's recently adopted exception to nonretroactivity under 22 O.S. 1981 § 3 is fundamentally unfair and in violation of due process of law.**

The due process principles governing judicial decisions that retroactively affect potential punishment -- whether the right is characterized as procedural or penal[1] -- focus on the same concerns that prompted **ex post facto** prohibitions -- the "protection of the individual against arbitrary actions of the government." **Wolf v. McDonnell,** 418 U.S. 539, 558, 94 S.Ct. 2963, 2976 (1974). See **Weaver v. Graham,** 101 S.Ct. 960, 964 (1981) (the **ex post facto** "ban ... restricts governmental power by restraining arbitrary and potentially vindictive legislation.").[2] When the potential punishment involved is death, due process and the eighth amendment require that the State, whether acting through the legislature or the courts, ensure that its decisions comport with "fundamental principles of procedural

[1] "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name." **Weaver,** 101 S.Ct. 960, 965, n. 15 (1981). "It is the effect, not the form, of the law that determines whether it [violates due process]]". **Weaver,** 101 S.Ct. at 965.

[2] **Weaver** held that retroactive changes in parole standards that "disadvantaged [the petitioner] by reduc[ing the] opportunity to shorten his time in prison simply through good conduct" violated the **lex post facto** clause. 101 S.Ct. at 967.

fairness....[and are] and appear to be, based on reason rather than caprice or emotion." **Gardner v. Florida,** 97 S.Ct. 1197, 1204 51 L.Ed.2d 393 (1977)(opinion of Stevens, J.).

Under the circumstances of this case, the court's decision to adopt a newly created exception to the nonretroactivity statute (22 O.S. 1981 § 3) and remand Mr. Cartwright's case for resentencing with a potential for another death sentence runs head on into constitutional concerns that militate against retrospective application of new laws. This is a case in which the Tenth Circuit Court of Appeals and the Supreme Court held that this court had violated the United States Constitution time and time again by approving a vague and overly broad construction of the "especially heinous" aggravating circumstance. Had this court correctly interpreted and applied eighth amendment principles to Mr. Cartwright's claim at that time, Oklahoma law would have required that his sentence be modified to life.

The judge of this court writing the opinion in this case is the same judge who initially rejected Mr. Cartwright's challenge to the validity of the "especially heinous" circumstance on direct appeal. He is also the same judge who was asked to recuse in post-conviction proceedings because of a conversation he had with the Muskogee County district judge about the speed with which Mr. Cartwright's case should move through the state courts.[3]

[3] See PC 85-594: Motion to Disqualify the Honorable Hez J. Bussey with affidavit of Don Ed Payne attached, filed September 23, 1985; and Order Denying Motion to Disqualify signed by Hez J. Bussey and filed September 26, 1985.

Under the circumstances of this case -- considering that the court **sua sponte** undertook reversal of existing law and creation of a special exception in Mr. Cartwright's case -- the appearance of arbitrariness, caprice and bias cannot be discounted. For these reasons, it is fundamentally unfair that Mr. Cartwright be deprived of the life sentence to which he was entitled when he filed this action. The unfairness is not alleviated by the court's recent characterization of the possibility of being sentenced to death as opposed to being entitled to a mandatory life sentence as being procedural and remedial. In reality, the procedural aspects of the statute have not changed - in both versions, when a death sentence is invalid, the statute calls for a remand for resentencing. It is only the substance of the available punishment that has changed -- from a maximum of life to the possibility of death. It is the retroactive application of that change in substance about which Mr. Cartwright complains.

2. Retroactive application of the recently adopted exception to nonretroactivity under 22 O.S. 1981 § 3 violates Sections 52 and 54 of Article 5 of the Oklahoma Constitution.

Sections 52 and 54 of Article 5 of the Oklahoma Constitution provide as follows:

> § 52. ... After suit has been commenced on any cause of action, the Legislature shall have no power to take away such cause of action, or **destroy any existing defense to such suit.** [Emphasis added].
>
> § 54. The repeal of a statute [including repeal by amendment, **One Chicago Coin's Play Boy Marble Bd., No. 19771 v. State ex rel. Adams,** 202 Okl.246, 212 P.2d 129 (Okl. 1949)] shall not ...affect any **accrued right,** or penalty incurred, or **proceedings begun by virtue of such repealed statute.** [Emphasis added].

By reversing its prior holdings in **Green** and **Dutton** and by retroactively applying a newly adopted exception to 22 O.S. 1981 § 3, the court has deprived Mr. Cartwright of an

absolute right to a life sentence and deprived him of a defense to a death sentence that existed when he filed this action.[4] The court's action is in utter disregard of the language, spirit and intent of Sections 52 and 54 of Article 5 of the Oklahoma Constitution.

Petitioner respectfully requests that the judgment be amended to exclude Mr. Cartwright from the effect of the "exception to nonretroactivity" and to remand the case for modification to life imprisonment in accordance with the law that existed when this action was filed. In the alternative, petitioner requests that the court vacate that portion of its judgment permitting reimposition of the death sentence in order to consider the effect of Sections 52 and 54 on the validity of the court's application of its newly adopted exception to 22 O.S. 1981 § 3.

C. The exception to nonretroactivity relied on by the Utah Supreme Court in *State v. Norton*, 675 P.2d 577 (Utah 1983) is not applicable to the Oklahoma nonretroactivity statute.

As this court pointed out in **Dutton**, 757 P.2d at 381, Title 22 includes a special statute regarding retroactivity of statutes that apply to criminal actions. 22 O.S. 1981 § 3. One of the arguments urged by the State in **Dutton** was that this provision only applied

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[4] Petitioner's right to have his sentence modified to life accrued when his jury sentenced him to death on the basis of an unconstitutional aggravating circumstance. However, the court need not reach this question in view of the fact that the right to a modification of his sentence to life had unquestionably accrued under established Oklahoma law when the federal courts invalidated his death sentence and he filed this action. **Blacketer v. State,** 485 P.2d 1069 (Okl.Cr. 1971) ("Accrued right" is a matured cause of action or legal authority to demand redress). Any subsequent change in Oklahoma law, such as this court's adoption of an exception to the nonretroactivity provisions of 22 O.S. 1981 § 3 which subjects him to a more severe punishment than life and deprives him of an existing defense to a death sentence violates of Sections 52 and 54 of Section 5 of the Oklahoma Constitution and due process of law.

to statutes that were codified in Title 22 and thus did not apply to the resentencing provision in Title 21. Holding that § 3 of Title 22 did apply to § 701.13(E)(2), the court referred to the fact that "by its own terms, Title 22 "applies to criminal actions...". 757 P.2d at 381. In Mr. Cartwright's case, the court does not abandon its decision in **Dutton** that § 3 of Title 22 on its face applies to § 701.13(E)(2) of Title 21. Instead, it concluded that it could ignore § 3 by "adopting the statutory exception to the general rule of nonretroactivity, enunciated by the Utah Supreme Court in **State v. Norton,** [675 P.2d 577 (Utah 1983)] - that remedial and procedural amendments apply to accrued, pending, and future actions." However, the court's reliance on the exception referred to in **Norton** is misplaced.

The statute discussed in **Norton** is not a statute that expressly refers to provisions applicable to criminal actions and it does not specifically refer to provisions related to criminal procedure. Instead it is a general statute that applies to all of Utah's laws.[5] See **Shupe v. Wasatch Electric Company, Inc.**, 546 P.2d 896 (Utah, 1976); and **Union Pacific Railroad Company v. Trustees, Inc.**, 329 P.2d 398 (Utah 1958). The exception upon which the Utah court relied was "a long-standing exception [recognized in Utah] to the general rule of nonretroactivity." 675 P.2d at 585. Unlike Oklahoma's § 3, Utah's nonretroactivity statutes does not specificaliy limit the retroactive application of statutes affecting criminal

[5] Utah Code Ann., § 68-3-3 provides:

> No part of these revised statutes is retroactive, unless expressly so declared.

actions and criminal procedures. Also, Oklahoma clearly does not have a long-standing exception to § 3 for procedural amendments. Such an exception to a statute that by its terms applies to "the code of criminal procedure" is incongruent with the original intent of the statute and in fact, would have the effect of repealing the statute.

As the court recognized in **Dutton**, in order to determine the intent of the legislature when it passed § 3, it is necessary to view the provision in context.[6] Section 2082 of the Revised Laws of 1910 (now 22 O.S. § 1) referred to the series of laws contained in Chapter 23 of the Revised Laws as "the penal code of the State of Oklahoma." 22 O.S. 1981 § 1. Section 2088 of the Revised Laws 1910 (§ 1 of Title 22) describing the purpose of the provisions in the "penal code," states:

> This chapter specifies the classes of persons who are deemed capable of crimes, and liable to punishment therefor; and defines the nature of the various crimes; and prescribes the kind and measure of punishment to be inflicted for each. The manner of prosecuting and convicting criminals is regulated by the code of criminal procedure.

Sections 5535, 5537, 5542, and 5544 of Revised Laws 1910 (now 22 O.S. 1981 §§ 1, 3, 8 & 10) state:

§ 1. Title of code [Section 5535, Revised Laws 1910]

This chapter shall be known as the code of criminal procedure of the State of Oklahoma.

§ 3. Code not retroactive [Section 5537, Revised Laws 1910]

No part of this code is retroactive unless expressly so declared.

[6] When these statutes were passed (1910), Title 21 and Title 22, Oklahoma Statutes did not exist.

§ 8. Application of statutes [Section 5542, Revised Laws 1910]

This chapter applies to **criminal actions** and to all other proceedings in criminal cases which are herein provided for. [Emphasis added].

§ 10. Criminal action defined. [Section 5544, Revised Laws 1910]

The **proceeding** by which a party charged with a public offense is accused and **brought** to trial and **punishment**, is known as a **criminal action**. [Emphasis added].

The clear intent of Section 5537 (now § 3) is that statutes regulating criminal actions, including statutes that affect criminal procedure, in the State of Oklahoma are not retroactive unless they are expressly so declared. In 1910, when § 5537 was adopted, Title 22 did not exist, so § 3 could not have been limited to those laws later published under Title 22 but rather expressly refer to any portion of the laws that govern criminal actions.

Moreover, if the 1985 amendment to the § 701.13(E)(2) is merely procedural, as the court now says that it is, it clearly should be governed by § 3 of Title 22, which expressly controls provisions in the "code of criminal procedure". Thus the 1985 amendment, effective July 16, 1985, is not retroactive and cannot be applied to cases in which the crime occurred in 1982, the trial in 1982, and the conviction that became final on direct appeal before July 16, 1985, the effective date of the amendment.

On the other hand, if the nature of the provision is to be determined by the Title of Oklahoma Statutes in which it appears, the remand provision - § 701.13(E)(2) must be considered a penal statute identifying a particular punishment for a particular class of

people. When so viewed, the 1985 amendment clearly prescribes certain punishment -- life or death -- for a particular class of persons -- those convicted of murder whose original death sentence is invalid. The amended or repealed provision likewise prescribed a particular punishment -- life imprisonment only -- for a particular class of persons -- those convicted of murder whose original death sentence is invalid. When viewed in this context, the 1985 amendment to § 701.13(E)(2) clearly increases punishment for a particular category of persons who previously could only receive life imprisonment. Mr. Cartwright is in that category and can only receive life imprisonment unless the 1985 amendment is retroactively applied to him.

In order to reconcile the terms of 22 O.S. 1981 § 3 with Judge Lumpkin's position, 60 OBJ at 1959 (concurring in part and dissenting in part), one would have to conclude the resentencing amendment (which was not placed in the "criminal code") was not intended as merely a provision of criminal procedure but rather is statute affecting substantive penal laws, in which case the **ex post facto** prohibitions would apply and Mr. Cartwright would be entitled to the benefit of the penal laws as they existed at the time of his offense -- in other words he would be (and is) entitled to have his case remanded for modification to life imprisonment. See § 701.13(E)(2) before the 1985 amendment.

D. The Ex Post Facto Analysis in *Coleman v. Saffle* is not applicable to the 1985 amendment to § 701.13(E)(2).

The decision in Mr. Cartwright's case mistakenly relies on the Tenth Circuit's opinion in **Coleman v. Saffle**, 869 F.2d 1377 (10th Cir. 1989). The court overlooks the fact that the **ex post facto** analysis in Coleman v. Saffle, was limited to this court's adoption

of a "harmless error" review for determining whether a jury's imposition of death is invalid in the first instance. See **Stouffer v. State**, 742 P.2d 562 (Okl.Cr. 1987) (on rehearing) and **Castro v. State**, 749 P.2d 1146 (Okl.Cr. 1987) (on rehearing). **Coleman** is not applicable to a retroactive application of a resentencing statute which increases punishment on resentencing from a maximum of life to the possibility of death for a person whose death sentence has been determined to be invalid. Thus, the **ex post facto** analyses in **Coleman** and **Castro** are not inconsistent with the analysis in **Dutton**.

Mr. Cartwright urges that the **ex post facto** holding in **Dutton** was correct and exposing him to a sentence of death by retroactively applying the 1985 amendment to his case deprives him of the substantial right of a maximum sentence of life in violation of the **ex post facto** prohibitions. However, the court need not reach this question since Mr. Cartwright is entitled to the benefit of the pre-1985 resentencing provisions of § 701.13(E)(2) under Oklahoma law as it existed when his death sentence was held to be invalid and when he filed this action, and a retroactive application of a newly created exception which would deprive him of his accrued right to a life sentence and a defense to a death sentence violates the Oklahoma constitution and due process of law.

E. Application of different standards of punishment on resentencing in Mr. Cartwright's case from those applied in *Dutton v. Dixon* and other cases in which the direct appeal was final before the 1985 amendment to § 701.3(E)(2) deprives Mr. Cartwright of due process of law and equal protection of the laws.

Mr. Cartwright's invalid death sentence was imposed before the legislature amended § 701.13(E)(2) to permit resentencing with the possibility of another death sentence. Also, his appeal to this court challenging the constitutionality of the "especially heinous"

aggravating circumstance and the validity of his death sentence was lodged in this court and his conviction affirmed before the effective date of the amendment. Except for an erroneous decision on Mr. Cartwright's direct appeal, he would now have a life sentence. The same is true of Lonnie Joe Dutton except that this court accorded Dutton the benefit of the law in effect at the time of his trial and appeal. To deprive Mr. Cartwright of the same protection afforded Lonnie Joe Dutton and other defendants whose death sentences were properly invalidated on direct appeal before the adoption of the 1985 amendment violates the due process and equal protection clauses of the Fourteenth Amendment.

CONCLUSION

For the reasons set forth above, Mr. Cartwright respectfully petitions the court to amend its judgment remanding his case for resentencing by requiring that his sentence be modified to life imprisonment in accordance with the provisions of the pre-1985 version of § 701.13(E)(2). In the alternative, petitioner asks that the court vacate that portion of the judgment permitting a reimposition of the death penalty and schedule oral argument in order that he can be heard regarding a retroactive application of the 1985 amendment to § 701.13(E)(2) to his case.

Respectfully submitted,

By: Mandy Welch

MANDY WELCH
Deputy Appellate Public Defender
Oklahoma Bar No. 9455
1660 Cross Center Drive
Norman, Oklahoma 73019
(405) 325-3128
ATTORNEY FOR APPELLANT

Certificate of Service

This is to certify that a true and correct copy of the foregoing Petition To Vacate was served upon the Attorney General for the State of Oklahoma by leaving a copy of the same with the clerk of the Court of Criminal Appeals this 21st day of August, 1989.

Mandy Welch

Mandy Welch

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
SEP 5 1989
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILLIAM THOMAS CARTWRIGHT,	)	
Petitioner,	)	
-vs-	)	No. H-88-820
THE STATE OF OKLAHOMA,	)	
Respondent.	)	

ORDER

Having carefully examined the petition, and being sufficiently advised in the premises, this Court finds that the petitioner's allegations of error are without merit, and the petition is **DENIED**. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 4th day of September, 1989.

JAMES LANE, VICE-PRESIDING JUDGE

NEAL P. BUSSEY, JUDGE

TOM BRETT, JUDGE

GARY L. LUMPKIN, JUDGE

ATTEST:

Clerk

"Exhibit B"

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA

1988 AUG -4 AM 9:44

LEWIS L. VAUGHN, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

WILLIAM THOMAS CARTWRIGHT,)
)
Petitioner,)
)
-vs-) No. 86-54-C
)
GARY D. MAYNARD, et al)
)
Respondents)

JUDGMENT

This case comes before this court pursuant to the mandate and judgment of the United States Court of Appeals for the Tenth Circuit in Cartwright v. Maynard, No. 86-1231, affirming in part and reversing in part this court's judgment denying a writ of habeas corpus.

In accordance with the opinion of the Court of Appeals, Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987), the writ of habeas corpus is denied with regard to petitioner's conviction for first degree murder, but, determining the case as law and justice require, Carafas v. LaVallee, 319 U.S. 234, 239, 88 S.Ct. 1556, 1560, 20 L.Ed. 2d 554 (1968); Chaney v. Brown, 730 F.2d 1334, 1358 (10th Cir.), cert. denied, 469 U.S. 1090, 105 S.Ct. 601, 83 L.Ed.2d 710 (1984), the death sentence of petitioner is invalid under the Eighth and Fourteenth Amendments to the United States Constitution, and the execution of petitioner under this invalid death sentence is enjoined. Cartwright v. Maynard, 822 F.2d at 1492 (10th Cir. 1987). This judgment is without

prejudice to further proceedings by the state for redetermination of the sentence on the conviction. Id. n. 8.

Dated this 4th day of August, 1988.

United States District Judge

Judgment prepared by plaintiff's attorney, Mandy Welch and was approved by phone by defendant's attorney, David Lee.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST:

LEWIS L. VAUGHN
Clerk, U.S. District Court
Eastern District of Oklahoma

By _____ Deputy Clerk

Dated SEP 7 1988

OKLAHOMA DEATH SENTENCES MODIFIED TO LIFE UNDER 1976 VERSION of § 701.13(E)(2)*

Boutwell v. State, 659 P.2d 322 (Okl. Cr. 1983)

Brennan v. State, 766 P.2d 1385 (Okl. Cr. 1988)

Bromley v. State, 757 P.2d 382 (Okl. Cr. 1988)

Burrows v. State, 640 P.2d 533 (Okl. Cr. 1982)

Chaney v. Brown, 699 P.2d 159 (Okl. Cr. 1985)

Dutton v. Dixon, 757 P.2d 376 (Okl. Cr. 1988)

Driskell v. State, 659 P.2d 343 (Okl. Cr. 1983)

Eddings v. State, 688 P.2d 342 (Okl. Cr. 1984)

Glidewell v. State, 663 P.1d 738 (Okl. Cr. 1983)

Green v. State, 713 P.2d 1032 (Okl. Cr. 1985)

Johnson v. State, 665 P.2d 815 (Okl. Cr. 1982)

Jones v. State, 660 P.2d 634 (Okl. Cr. 1983)

Munn v. State, 658 P.2d 482 (Okl. Cr. 1983)

Wilson v. State, 756 P.2d 1240 (Okl. Cr. 1988)

* The offenses in all of cases cited above were committed before July 16, 1985, and resentencing was governed by the version of § 701.13(E)(2) before the 1985 resentencing amendment.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUL 31 1989
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FOR PUBLICATION

WILLIAM THOMAS CARTWRIGHT,
Petitioner,
-vs-
STATE OF OKLAHOMA,
Respondent.

No. H-88-820

AUTHORIZED FOR FILING
JUL 31 1989
COURT OF CRIMINAL APPEALS

OPINION

BUSSEY, Judge:

On October 4, 1988, petitioner filed an application for a writ of Habeas Corpus and Modification of Invalid Death Sentence to Life Imprisonment in Muskogee County District Court Case No. CRF-82-192. On November 16, 1988, oral argument on the matter was held before this Court.

I.

PROCEDURAL BACKGROUND

Petitioner was tried by jury and convicted of First Degree Murder and sentenced to death on October 25, 1982. Petitioner's first degree murder conviction and sentence of death was affirmed on direct appeal. Cartwright v. State, 695 P.2d 548 (Okl. Cr. 1985), cert. denied, 473 U.S. 911, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985). Petitioner's appeal from denial of state post-conviction relief was denied. Cartwright v. State, 708 P.2d 592 (Okl. Cr. 1985), cert. denied, 474 U.S. 1073, 106 S.Ct. 837, 88 L.Ed.2d 808 (1986). His petition for a writ of habeas corpus

in the United States District Court for the Eastern District of Oklahoma was denied. The Tenth Circuit Court of Appeals affirmed the denial of habeas corpus relief in Cartwright v. Maynard, 802 F.2d 1203 (10th Cir.1986). Following rehearing en banc, however, petitioner's death sentence was vacated by the Tenth Circuit's holding that Oklahoma's aggravating circumstance that a murder was especially heinous, atrocious, or cruel was being applied in an unconstitutionally vague and overbroad manner. Cartwright v. Maynard, 822 F.2d 1477 (10th Cir.1987). The Tenth Circuit directed the district court "to enter judgment that the writ of habeas corpus is denied but as law and justice require, the death sentence of petitioner is invalid under the Eighth and Fourteenth Amendments to the United States Constitution." The Tenth Circuit further stated that the judgment was without prejudice to further proceedings by the State for redetermination of the sentence on the conviction. Id. at 1492. Finally, the Tenth Circuit expressed "no opinion concerning the constitutionality of a retroactive application of Oklahoma's [resentencing] procedure." Id. at 1492 n.8. The State of Oklahoma appealed to the United States Supreme Court which delivered a unanimous opinion upholding the opinion of the Tenth Circuit. Maynard v. Cartwright, ___U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). The Supreme Court also declared that its judgment was without prejudice to further proceedings in the state courts for redetermination of the appropriate sentence. Id. at U.S._, 108 S.Ct. at 1860, 100 L.Ed.2d at 383.

II.

In Stouffer v. State, 742 P.2d 562, 563-64 (Okl. Cr. 1987) (Opinion on Rehearing), this Court reconsidered 21 O.S. 1981, §701.13 (F), and held that it had the authority to independently reweigh aggravating and mitigating circumstances when, on appellate review, an aggravating circumstance found by the jury was determined to be invalid. We stated that such a review was implicit in this Court's obligation to make a factual substantiation of the verdict and determination of the validity of the sentence. Id. Prior to Stouffer, this Court had, when finding an error during the sentencing stage of trial, automatically modified the sentence to life imprisonment.

In Castro v. State, 749 P.2d 1146, 1150 (Okl. Cr. 1987) (Opinion on Rehearing), this Court discussed the ex post facto aspects of Stouffer. We stated that the principles set forth in Stouffer did not deprive [defendants] of a defense which was previously available, or change the legal definition of the offense, or the punishment to be meted out, or affect the criminal quality of the act charged, or change the questions which may be considered by the jury in establishing guilt or innocence. Castro, at 1511. Finally, quoting Dobbert v. Florida, 432 U.S. 282, 293-94, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977), this Court asserted that procedural changes in a statutory capital sentencing scheme which simply alter the methods employed in determining whether the death penalty was to be imposed is not ex post facto even though it may work to the disadvantage of a defendant. Id. at 1150.

In Dutton v. Dixon, 757 P.2d 376, 381 (Okl. Cr. 1988), a majority of this Court held that 21 O.S. Supp. 1985, §701.13 (E)(2), which allows this Court to set aside a death sentence when error is found during the sentencing stage of trial and remand the case for resentencing by the trial court, cannot be applied retroactively. The prior statute automatically modified the sentence to life imprisonment if error was found in the sentencing stage. See 21 O.S. 1981, § 701.13 (E)(2). The Dutton court stated that "the retroactive application of the 1985 resentencing amendment of Section 701.13 (E)(2)...would constitute a violation of the Federal and Oklahoma Constitutions as an ex post facto application of a law which inflicts a greater punishment than the law annexed to the crime at [the] time it was committed or alters [the] situation of [an] accused to his disadvantage." Id. at 381. The majority concluded, "[w]hile the 1985 resentencing amendment may appear to take a seemingly procedural form, in its practical operation it deprives the petitioner of a substantial right, and ... it is therefore ex post facto." Id. at 381.

We find the ex post facto analysis applied in Castro to be highly inconsistent with the ex post facto analysis applied in Dutton. Castro held that the retroactive application of a judicial interpretation of a statute, denying defendants automatic modification to life imprisonment, does not violate the ex post facto prohibition, while Dutton held that the retroactive application of a statute providing for resentencing violates ex post facto principles because it deprives defendants of a

substantial right, i.e., automatic modification to life imprisonment.

III.

In Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989), the Court stated that changes in the law by judicial construction implicate the Due Process Clause while the prohibition against ex post facto laws concerns legislative enactments. However, the Court applied ex post facto principles in deciding the due process issues of Stouffer because an unforseeable judicial enlargement of a criminal statute operates precisely like an ex post facto law. Id. at 1385. The Court stressed that the relevant inquiry in ex post facto analysis is whether the change impairs "substantial personal rights," or merely changes "modes of procedure which do not effect matters of substance."

In Coleman, the Court stated that an offender does not win an ex post facto argument by proving disadvantage alone. See also Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 53 L.Ed. 2d 344 (1977). The Court declared that the true focus of ex post facto analysis is on (1) the elements of the offense, (2) the conditions and quantum of punishment, and (3) the quantity and degree of proof necessary to establish guilt. See also United States v. Affleck, 765 F.2d 944, 948 (10th Cir. 1985); Beazell v. Ohio, 269 U.S. 167, 170, 46 S.Ct. 68, 70 L.Ed. 216 (1925).

We find that the amended statute allowing for resentencing does not violate the prohibition of ex post facto. As applied to the petitioner, the crime for which he was charged, the punishment prescribed therefor, and the quantity or degree of

proof necessary to establish guilt, all remain unaffected by the amended statute. See Miller v. Florida, 482 U.S.___, 107 S.Ct.2446, 2452, 96 L.Ed.2d 351, 362 (1987). Even on remand, petitioner faces the same possible punishment as before: life imprisonment or death. We therefore find the new sentencing amendment to be a procedural change in the law, and not prohibited by the ex post facto prohibition.

We also find the argument in Dutton, that defendants had a "right" to a mandatory sentence of life imprisonment if error was found in the sentencing stage of trial, to be inaccurate. Defendants may have had **expectations** that their sentences would automatically be modified to life imprisonment, but the ex post facto clause does not prevent the State from depriving a criminal defendant of an expectation as to a procedure that has not yet accrued to his benefit. See State v. Norton, 675 P.2d 577 (Utah 1983). We hold that petitioner can be resentenced under the amended statute without violating due process or the ex post facto prohibition of either the Oklahoma or Federal Constitutions.

IV:

With regard to statutory construction and retroactivity, 22 O.S. 1981, §3 provides: "No part of this code is retroactive unless expressly so declared." In Dutton, the majority held that since the amendment contained no express language indicating its retroactive effect, it can only apply prospectively. Dutton, at 381. However, we find that we should adopt the statutory exception to the general rule of nonretroactivity, enunciated by the Utah Supreme Court in State v. Norton, supra, which allows

procedural remedial statutes to apply to pending actions. For purposes of the exception, a case is pending from the time of its commencement until its final determination upon appeal. Norton, at 585. As we have already determined, the resentencing amendment is procedural, as it has no substantive effect on petitioner's crime. The amendment may or may not affect the outcome when petitioner is resentenced, depending upon the sentencer's determination after properly weighing the mitigating and aggravating circumstances. Accordingly, 22 O.S. 1981, §3 does not prohibit application of the amended sentencing statute on remand. To the extent Dutton v. Dixon, 757 P.2d 376 (Okl. Cr. 1988) is inconsistent with this opinion, it is hereby expressly overruled.

Finally, we are aware that 22 O.S. 1981, §701.10 appears to require that capital defendants be sentenced by the same jury that convicted them. However, statutes are to be construed so as to effectuate their purpose. Owens v. State, 665 P.2d 832, 834 (Okl. Cr. 1983). Moreover, the more recent enactment, Section 701.13 (E)(2) controls over Section 701.10. See Delfrate v. State, 732 P.2d 900, 902 (Okl. Cr. 1987). Thus, we find that Section 701.13 (E)(2) authorizes this Court to remand a capital case for resentencing before a new jury or before the trial judge, whichever is applicable.

V:

We therefore hold that Case No. CRF-82-192 must be **REMANDED** to Muskogee County District Court for **RESENTENCING** pursuant to 21 O.S. Supp. 1985, §701.13 (E)(2).

MANDY WELCH
DEPUTY APPELLATE PUBLIC DEFENDER
NORMAN, OKLAHOMA
ATTORNEY FOR PETITIONER

ROBERT H. HENRY
ATTORNEY GENERAL
SUSAN STEWART DICKERSON
ASSISTANT ATTORNEY GENERAL
STATE OF OKLAHOMA
OKLAHOMA CITY, OKLAHOMA
ATTORNEY FOR RESPONDENT

OPINION BY: BUSSEY, J.
PARKS, P.J.: DISSENTS
LANE, V.P.J.: CONCURS
BRETT, J.: CONCURS
LUMPKIN, J.: SPECIALLY CONCURRING

LUMPKIN, Judge: SPECIALLY CONCURRING

I concur with the Court's opinion on this case and write to further address the application of 22 O.S. 1981, § 3. Title 22 O.S. 1981, § 1, provides: "This chapter shall be known as the code of criminal procedure of the State of Oklahoma." Title 22 O.S. 1981, § 3 applies to the code of criminal procedure. Title 21 O.S. 1981, § 1, provides: "This chapter shall be known as the penal code of the State of Oklahoma." The provisions of Title 21, Oklahoma Statutes, must be interpreted under the **ex post facto** prohibition of either the Oklahoma or Federal Constitutions. Title 22 O.S. 1981, § 3 is not applicable to the penal code of the State of Oklahoma contained in Title 21, Oklahoma Statutes.

PARKS, P.J., Dissenting

I dissent for the reasons stated in my opinion in **Dutton** v. **Dixon**, 757 P.2d 376 (Okla. Crim. App. 1988). I would emphasize that under 22 O.S. 1981, § 3, the resentencing provision codified at 21 O.S. Supp. 1985, § 701.13(E)(2), is not to be applied retroactively "unless expressly so declared." Because retroactivity was not "expressly so declared" by the Oklahoma Legislature, the resentencing amendment should not be applied retroactively. Dutton, 757 P.2d at 381.

ORIGINAL

Supreme Court, U.S.
FILED
NOV 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-5934

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

WILLIAM THOMAS CARTWRIGHT,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA

SUSAN STEWART DICKERSON
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL DIVISION

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

November, 1989

QUESTIONS PRESENTED

1. Whether application of the procedural rule enacted in 1985 permitting remand of Petitioner's capital case for resentencing in the event of punishment-stage error to a homicide committed in 1982 violates the **Ex Post Facto Clause** of the Constitution.

2. Whether the change in position of the Oklahoma Court of Criminal Appeals regarding such alleged violation of ex post facto principles affects Petitioner's substantive rights by making his crime greater or inflicting greater punishment than when the crime was committed.

3. Whether Petitioner can again be sentenced to death or is entitled only to receive a sentence of life imprisonment pursuant to the determinations made in answering the above-stated questions.

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No. 89-5934

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

WILLIAM THOMAS CARTWRIGHT,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, State of Oklahoma, by and through Robert H. Henry, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Court of Criminal Appeals of the State of Oklahoma.

OPINIONS BELOW

The Opinion of the Oklahoma Court of Criminal Appeals below remanding Petitioner's cause for resentencing of Petitioner is reported as Cartwright v. State, 778 P.2d 479 (Okla. Crim. App. 1989). That action involved Petitioner's filing a state habeas corpus action seeking to preclude his resentencing as violative of ex post facto principles.

The need to address Petitioner's sentence arose from this Court's affirmance of a grant of federal habeas corpus relief in Maynard v. Cartwright, 486 U.S. 356 (1988), where this Court upheld the decision of the United States Court of Appeals for the Tenth Circuit that Petitioner's death sentence must be vacated because jury discretion was not channeled constitutionally in assessing whether the murder of Hugh Riddle was "especially heinous, atrocious or cruel". The Tenth Circuit opinion is reported as Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) (en banc). A previous decision by a three-judge panel of that court affirming the denial of federal habeas corpus relief is reported as Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986).

The opinion of the Oklahoma Court of Criminal Appeals on direct appeal is reported at 695 P.2d 548 (Okla. Crim. App. 1985), **cert. denied**, 473 U.S. 911 (1985). The affirmance of Petitioner's appeal from the denial of post-conviction relief is reported at 708 P.2d 592 (Okla. Crim. App. 1985), **cert. denied**, 474 U.S. 1073 (1986).

JURISDICTION

The Opinion of the Oklahoma Court of Criminal Appeals was entered on July 31, 1989. This Court's jurisdiction is purportedly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 10, of the United States Constitution provides, in part:

> No State shall ... pass any ...ex post facto Law ...

The Eighth Amendment to the United States Constitution provides, in relevant part:

> Excessive bail shall not be required, ... nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in part:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law.

Okla.Stat.tit. 21 § 701.13 (1981) provided in relevant part:

> E. ...In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:
>
> 1. Affirm the sentence of death; or
>
> 2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

Okla.Stat.tit. 21 § 701.13 (West Supp.1985) provides as follows, in pertinent part:

> E. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

> 1. Affirm the sentence of death; or
>
> 2. Set the sentence aside and remand the case for resentencing by the trial court.

Okla.Stat.tit. 21, § 1066 (1981) provides, in pertinent part:

> The appellate court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial.

STATEMENT OF THE CASE

The Petitioner, William Thomas Cartwright, was convicted in the District Court, Muskogee County, State of Oklahoma, of shooting with intent to kill and murder in the first degree. The Petitioner received sentences of seventy-five (75) years and death respectively.

Upon rehearing en banc of the Petitioner's appeal from denial of federal habeas corpus relief, the United States Court of Appeals for the Tenth Circuit vacated Petitioner's death sentence. Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1988) (en banc). This Court affirmed that decision in Maynard v. Cartwright, 486 U.S. 356 (1988).

Petitioner filed a petition for a writ of habeas corpus in the Oklahoma Court of Criminal Appeals, seeking the modification of his sentence to one of life imprisonment. That Court reversed its position that the 1985 resentencing amendment could not be retroactively applied under ex post facto principles and remanded Petitioner's cause to the state district court for resentencing. Cartwright v. State, 778 P.2d 479 (Okla. Crim. App. 1989).

Petitioner, in his Petition at 5, makes reference to an acknowledgement by the State that modification to a life sentence was the appropriate remedy. Importantly, the State simply acknowledged the status of the law as then interpreted by the Oklahoma Court of Criminal Appeals, not the correctness of that interpretation. As addressed, infra, Respondent contends that application of the resentencing provision of § 701.13(E)(2) in the present case does not violate the **Ex Post Facto Clause** of the United States Constitution.

A petition for rehearing on the state habeas corpus proceeding was denied by the Oklahoma Court of Criminal Appeals on September 5, 1989.

STATEMENT OF THE FACTS

A discussion of the facts involved in the instant action is found in Cartwright v. State, 695 P.2d 549, 550-51 (Okla. Crim. App. 1985). This Court also discussed the facts in Maynard v. Cartwright, 108 S.Ct. 1853, 1856 (1988). Because of this Court's familiarity with those facts and because a review of the facts is not central to determination of the issue presented herein, Respondent declines to engage in further discussion of the facts of Petitioner's crimes against Hugh and Charma Riddle.

REASONS WHY THE WRIT SHOULD BE DENIED

PROPOSITION

THE PETITIONER MAY BE RESENTENCED WITHOUT VIOLATING THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION

In Maynard v. Cartwright, 108 S.Ct. at 1860, this Court stated that its decision affirming the vacation of Petitioner's death sentence due to the overbroad interpretation of the statutory aggravating circumstance that the murder of Hugh Riddle was especially heinous, atrocious or cruel was

> "without prejudice to further proceedings in the state courts for redetermination of the appropriate sentence."

Petitioner sought to have the sentence of life imprisonment declared the appropriate sentence through the filing of the state habeas corpus petition wherein he asserted that the only recourse was to modify his sentence to life imprisonment.

The Oklahoma Court of Criminal Appeals disagreed, reversing its previous position that a life sentence was the only possible punishment available. Cartwright v. State, 778 P.2d at 482. In Dutton v. Dixon, 757 P.2d 376, 381 (Okla. Crim. App. 1988), a majority of the Oklahoma Court of Criminal Appeals held that Okla.Stat.tit. 21 § 701.13(E)(2) (West Supp. 1985) could not be

applied retroactively under ex post facto principles. In Cartwright v. State, 778 P.2d at 482, the court engaged in a discussion of such principles, concluding that application of the resentencing statute in Petitioner's case does not violate such principles, overruling Dutton v. Dixon. Cartwright v. State, 778 P.2d at 483.

The Oklahoma Court of Criminal Appeals relied upon the opinion of the United States Court of Appeals for the Tenth Circuit in Coleman v. Saffle, 869 F.2d 1377, 1385 (10th Cir. 1989), in reaching this conclusion. Coleman also involved the appeal from denial of federal habeas relief of a capital defendant who raised an ex post facto claim. That claim concerned the change in interpretation by the Oklahoma Court of Criminal Appeals concerning its power to reweigh aggravating and mitigating circumstances in the event that an aggravating circumstance was declared infirm upon appeal. Although that claim addressed judicial interpretation rather than retroactive interpretation of a statutory enactment, the Tenth Circuit applied ex post facto principles in denying Coleman's claim.

As discussed by the court in Coleman v. Saffle, id.:

> [T]he critical test, as stated in recent Supreme Court cases, is whether, as applied, the change impairs "substantial personal rights," or merely changes "modes of procedure which do not affect matters of substance." Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 229 [sic], 53 L.Ed.2d 344 (1977) (quoting Beazell v. Ohio, 269 U.S. 167, 171, 46 S.Ct. 68, 69, 70 L.Ed. 216 (1925)); see also Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987); United States v. Affleck, 765 F.2d 944, 948 (10th Cir.1985)(en banc)(no ex post facto violation if new law is merely procedural and does not increase punishment for, or change the elements of, an offense, or alter facts necessary to establish guilt).

Applying the analysis employed by the Tenth Circuit in the Coleman case, the Oklahoma Court of Criminal Appeals held that Petitioner "can be resentenced without violating due process or the ex post facto prohibition of either the Oklahoma or Federal Constitutions." Cartwright v. State, 778 P.2d at 482. Important to the court's determination was the fact that resentencing would

subject Petitioner to the same possible punishments as existed at the time of trial: death or life imprisonment.

Moreover, the court concluded that Petitioner did not have a "right" to a modified sentence of life imprisonment (the previous erroneous interpretation of ex post facto principles employed by the Oklahoma Court of Criminal Appeals in Dutton v. Dixon, 75 P.2d 376, 381 (Okla. Crim. App. 1988) and its predecessors). As stated by the court:

> Defendants may have had expectations that their sentences would automatically be modified to life imprisonment, but the ex post facto clause does not prevent the State from depriving a criminal defendant of an expectation as to a procedure that has not yet accrued to his benefit. See State v. Norton, 675 P.2d 577 (Utah 1983).

Cartwright v. State, 778 P.2d at 482.

It would be illogical indeed to permit a retrial of both issues of guilt and punishment where an appellate court has determined that error occurred during the guilt stage of a capital case, yet not permit a retrial of the sentencing stage of trial where error occurred only during that latter stage of trial. Respondent notes that its position consistently has been that it is permissible for the Oklahoma Court of Criminal Appeals to independently reweigh aggravating and mitigating circumstances (the Coleman issue) and to resentence in the event of punishment-stage error (the issue presently before this Court). Oklahoma law long has provided the Oklahoma Court of Criminal Appeals with the authority to order a new trial as a mechanism to correct errors. Okla.Stat.tit. 22, § 1066 (1981). Here correction of error is accommodated by a new trial regarding punishment. The State simply acceded to stare decisis in the brief on rehearing when it acknowledged that Oklahoma law did not allow for resentencing in Petitioner's case.

Respondent submits that the rule announced by the Oklahoma Court of Criminal Appeals in Petitioner's attempt to gain state habeas corpus relief is the correct interpretation of law addressing ex post facto principles. This Court has addressed

those principles in the context of a state criminal capital case. In Dobbert v. Florida, 432 U.S. 282, 292 (1977), this Court concluded that statutory changes in the role of judge and jury in death penalty cases rendering the jury's verdict on the imposition of sentence advisory did not violate the Ex Post Facto Clause of the Constitution when applied to a case in which the changes in the law occurred after the commission of the crime but prior to the trial of the matter. The changes were viewed as procedural in nature, permitting their application to a case which commenced prior to their effective date.

Procedural changes do not constitute ex post facto laws even though they may work to the disadvantage of a defendant. Id., at 293. In the present case, the Petitioner may be disadvantaged by the 1985 amendment providing for resentencing through a perceived claim of entitlement to modification of his sentence to life imprisonment where punishment-stage error was present. However, the provision for resentencing does not increase the potential punishment to be received: as charged pursuant to the filing of a Bill of Particulars, Petitioner was subject to a sentence of death or life imprisonment. A resentencing procedure subjects him to those same alternatives. Cf. Miller v. Florida, 482 U.S. 423, 436 (1987) (state sentencing guideline statute enacted after the defendant's crime which increased the presumptive sentence range constituted an ex post facto law as applied to that defendant).

The affirmance by this Court of the Tenth Circuit's decision that Petitioner's sentence of death was premised upon an invalid statutory aggravating circumstance does not operate as an acquittal regarding a verdict of death upon consideration of any aggravating circumstance which constitutionally does apply. The 1985 resentencing amendment operates as a procedure to ensure that the appropriate sentence is imposed in a capital case. It does not create a new circumstance in which death may be the appropriate sentence as was the case in Kring v. Missouri, 107 U.S. 221, 228 (1883). The Tenth Circuit distinguished application of Kring in United States v. Affleck, 765 F.2d 944, 950 (10th Cir. 1985), when

it concluded that new rules governing bail pending appeal did not violate ex post facto principles. Kring is similarly distinguishable in the instant case.

Neither is the instant situation akin to that present in Weaver v. Graham, 450 U.S. 24 (1981), where this Court held that a Florida "gain time" sentencing credit statute was an ex post facto law as applied to a criminal defendant whose crime occurred prior to the statute's enactment. In that case this Court reiterated its recognition

> that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed (cites omitted)

450 U.S. at 32. Petitioner Weaver had pleaded guilty to second degree murder, no doubt evaluating his actual incarceration time in making his decision to so plead.

In the present case Petitioner entered pleas of not guilty to the crime and Bill of Particulars. Moreover, the jury imposing sentence in Petitioner's case based its determination of sentence upon weighing aggravating and mitigating circumstances, not eligibility for release. Under Oklahoma law the jury is precluded from being informed of parole considerations. See eg. Kovash v. State, 519 F.2d 517 (Okla. Crim. App. 1974), cert. denied 419 U.S. 830. See also Nguyen v. State, 769 P.2d 167, 173 (Okla. Crim. App. 1988) (rule applies to capital case). Similarly the factfinder who will resentence Petitioner (a jury should he request one) will evaluate the appropriateness of the death sentence through proper criteria.

Remanding Petitioner's case for resentencing does not constitute an arbitrary act, but rather a reasoned response to this Court's directive that his prior sentence was unconstitutionally imposed. As discussed, supra, remand of the cause for resentencing is not violative of ex post facto principles.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA

Susan Stewart Dickerson

SUSAN STEWART DICKERSON, OBA #2346
ASSISTANT ATTORNEY GENERAL

ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL DIVISION

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF MAILING

On this 29th day of November, 1989, a true and correct copy of the foregoing was mailed to:

Mandy Welch
16601 Cross Center Drive
Norman, OK 73019

Susan Stewart Dickerson

SUSAN STEWART DICKERSON

SSD/vid/cartwrt.brf

SUPREME COURT OF THE UNITED STATES

WILLIAM THOMAS CARTWRIGHT *v.* OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 89-5934. Decided June 25, 1990

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I join the Court's decision except insofar as the judgment, which is without prejudice to further sentencing proceedings, does not expressly preclude the re-imposition of the death penalty. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would direct that the re-sentencing proceedings be circumscribed such that the State may not reimpose the death sentence.